122-300

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 297.

THE MINNEAPOLIS GAS LIGHT COMPANY, APPELLANT,

vs.

THE KERR MURRAY MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 15, 1884.

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1 UNITED STATES OF AMERICA, }
District of Minnesota, } *ss:*

Circuit Court of the United States.

I, O. B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the following, consisting of 145 pages, numbered consecutively from one to 145, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree, and all other proceedings in said cause therein named, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this ninth day of January, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and eighth year.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS, *Clerk.*

2 UNITED STATES OF AMERICA, *ss:*

Circuit Court of the United States, District of Minnesota.

THE KERR MURRAY MANUFACTURING COMPANY, Complainant,
vs.
THE MINNEAPOLIS GAS LIGHT COMPANY, Defendant.

To The Kerr Murray Manufacturing Company, complainant above named, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in October, 1884, pursuant to an appeal filed by the above-named defendant in the clerk's office of the circuit court of the United States for the district of Minnesota, to show cause, if any there may be, why the final decree entered in said above-entitled action in favor of said complainant and against said defendant and mentioned in said appeal should not be corrected and speedy justice should not be done to the parties in that behalf.

2½ Witness the Honorable R. R. Nelson, judge of the district court of the United States for said district of Minnesota, this 25th day of October, A. D. 1883.

R. R. NELSON, *Judge.*

[Endorsed:] U. S. circuit court, district of Minnesota. Chan. C. 217. The Kerr Murray Man'f'g Company *vs.* The Minneapolis Gas Light Company. Citation. Service of the within citation is hereby admitted this 25th day of October, A. D. 1883. Bigelow, Flandrau & Squires, pl'ff's sol'rs. Filed Oct. 25th, '83. O. B. Hillis, clerk. Babcock & Davis, solicitors for defendant.

3 DISTRICT OF MINNESOTA, *ss:*

United States Circuit Court, District of Minnesota. June Term, A. D. 1883. In Equity.

KERR MURRAY M'F'G CO., Plaintiff,

against

MINNEAPOLIS GAS LIGHT CO., Defendant.

Bigelow, Flandrau & Squires, plaintiff's solicitors; Babcock & Davis, defendant's solicitors.

Be it remembered that on this 15th day of July, A. D. 1882, came the complainant above named, by Bigelow, Flandrau & Squires, its solicitors and of cou-sel, and filed in the clerk's office of said court its bill of complaint in words and figures as follows, to wit:

4 Circuit Court of the United States for the District of Minnesota. In Equity.

THE KERR MURRAY MANUFACTURING COMPANY

vs.

THE MINNEAPOLIS GAS LIGHT COMPANY.

To the judges of the circuit court of the United States for the district of Minnesota:

Your orator, the Kerr Murray Manufacturing Company, the complainant above named, respectfully alleges & shows unto this court that it is a corporation duly created, organized, and existing under the laws of the State of Indiana, and was such a corporation and a citizen of the said State of Indiana at all the times hereinafter stated, and is now a citizen of such State.

That the defendant above named, The Minneapolis Gas Light Company, was at all said times and is now a corporation created, organized, and existing under the laws of the State of Minnesota and a citizen of said last-named State.

That your orator has been ever since its incorporation and
5 is now engaged in the manufacture and erection of gas-making machinery and fixtures.

That, on or about the 19th day of February, 1881, at the special instance and request of the said defendant, your orator manufactured, erected, & set up on the premises of said defendant, at Minneapolis, in Hennepin county, in the State of Minnesota, and upon the lot of land hereinafter particularly described, one telescopic gas-holder, seventy-two feet in diameter by forty feet deep, at the agreed price of nine thousand nine hundred and seventy dollars ($9,970), which said price for said gas-holder was partly based upon the price of iron at the time when said agreement was made and said price fixed, and it was by and between said parties complainant and defendant understood & agreed that if there should be a fall in the price of iron from the then-established price before the said gas-

holder was constructed said defendant should have the bene-
6 fit of such fall and a reduction in the price of the iron which was necessary to construct the same, and that there was a fall in price of such iron to the amount of $900, which reduced the contract and agreed price of said gas-holder to the sum of $9,070.

That it was also agreed & understood by and between your orator and said defendant that said defendant was to pay to your orator whatever costs or expense it was put to for lumber and material for scaffolding neccessary in erecting and putting up said gas-holder, and that your orator was neccessarily put to the expense of one hundred and thirty-eight dollars and twenty-five cents for lumber for scaffolding in and about the putting up and erection of said gas-holder, making in all due to your orator from said defendant for the manufacture, putting in, and setting up of said gas-holder the sum [of] nine thousand two hundred and eight $\frac{25}{100}$ dollars.

That said gas-holder was in all things manufactured, put up, and erected in a good, substantial, and workmanlike manner, and
7 was fairly & reasonably worth the said sum so as aforesaid agreed upon to be paid by said defendant therefor.

That the said defendant has paid on the same the sum of three thousand seven hundred and ninety-two and $\frac{74}{100}$ dollars and no more.

That said defendant wholly refused and refuses to pay the balance due thereon of five thousand four hundred and fifteen $\frac{74}{100}$ dollars, (5,415.74), although it has often been requested to pay the same, and that there is now justly due and payable from said defendant to said complainant the sum of $5,415.74, with interest on said sum at the rate of seven per cent. per annum from the said 19th day of February, 1881.

That said gas-holder was by your orator erected on the lands of said defendant within the city limits of Minneapolis, an incorporated city within county of Hennepin, State of Minnesota, which said lands are described as follows:

Beginning at the southwest corner of sec. (24) twenty-four
8 of township twenty-nine (29) of range twenty-four (24), according to the United States Government survey of the same; thence running north on the west line of said section twenty-four (24) to the bank of the Mississippi river; thence along said bank in a southeasterly direction one and seventy one-hundredths (1.70) chains to a stake; thence south to a stake or point on the south line of said section twenty-four (24); thence west on the said south line of said section twenty-four (24) to the place of beginning, containing one (1) acre of land.

That said gas-holder has, ever since the same was so erected and put up on said lands, remained thereon and been used by said defendant in the manufacture of gas for its customers and the supply of the same to its customers.

That pursuant to the statute of the State of Minnesota in such case made and provided your orator made an account in writing of labor, skill, material, and machinery furnished to said defendant

as aforesaid, and duly made oath to the correctness of the same, and within the time provided by said laws in that behalf made and provided, to wit, on February 6th, 1882, filed the same in the
9&10 office of the register of deeds of said county of Hennepin, which said account, with the said verification of the same, was duly recorded at length in the records of said register of deeds' office on said last-named day, and within the time required by law for the making of the same *in* lien on the lands herein, and in said described —, and that said account thereupon became a lien upon said lands so described herein & therein from the time of furnishing said gas-holder as aforesaid, and still remains such lien on such lands.

All of which doings & pretenses of the said defendant are contrary to equity and conscience and tend to manifest wrong, injury, & oppression of your orator in the premises. In tender consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly cognizable and relievable—

Your orator prays the judgment and decree of this court that there is due your orator from said defendant $5,415.57, with in-
11 terest as aforesaid, and that it may recover of the said defendant the said sum five thousand four hundred and fifteen and $\frac{51}{100}$ dollars, with interest on the same from the said 19th day of February, 1881, together with its costs and disbursements of this suit, and that this sum so to — adjudged due and recovered may — the judgment and decree of this court be declared a lien on said described lands, and that said lands may be sold to satisfy such judgment, pursuant to the statutes in such case made and provided and the rules and practice of this court.

To the end, therefore, that complainant may have that relief which it can only obtain in a court of equity, and the said defendant may answer in the premises (but not upon oath or affirmation, the benefit whereof is hereby expressly waived by the complainant) to the best and uttermost of its knowledge, remembrance, information, & belief—

May it please your honor to grant unto your orator a writ of subpœna, to be directed to said defendant, The Minneapolis Gas Light Company, thereby commanding it, at a certain time and under a
12 certain penalty therein to be limited, personally to appear before this honorable court and then & there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem agreeable to equity and good conscience.

And that your order may have such other, further, or different relief in the premises as to this court may seem meet and proper in the premises.

BIGLOW, FLANDRAU & SQUIRES,
Solicitor- for Complainant, and of Council for Complainant.

Filed July 15, '82.

H. E. MANN, *Clerk*,
By O. J. REYNOLDS, *Deputy*.

13 & 14 Pursuant to the prayer of said complaint the following order was entered in the common-rule book on page 48, viz:

KERR MURRAY M'F'G CO.
vs.
MINNEAPOLIS GAS LIGHT CO.

JULY 15TH, 1882.

The plaintiff having filed a bill of complaint in this cause, on application of Messrs. Bigelow, Flandrau & Squires, its solicitors—
Ordered, That a writ of subpœna issue as herein prayed for.

Thereupon a subpœna in chancery duly issued out of the clerk's office in words and figures as follows, to wit:

15 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

The President of the United States of America to the Minneapolis Gas Light Company, Greeting:

You are hereby commanded to appear before our judges of our circuit court of the United States of America for the district of Minnesota, at Saint Paul, in said district, on the first Monday in the month of August next, to answer the bill of complaint of The Kerr Manufacturing Company, this day filed in the clerk's office of said court, in said Saint Paul, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Minnesota to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul aforesaid, this 15th day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 107 year.

[U. S. Circuit Court Seal.]

H. E. MANN, *Clerk*,
By O. J. REYNOLDS, *Dep'y*.

Memorandum.

The within-named defendant is notified that unless it enters its appearance in the clerk's office of said court, at Saint Paul aforesaid, on or before the day to which this writ is returnable, the complaint will be taken against it as confessed, and a decree entered accordingly.

[U. S. Circuit Court Seal.]

H. E. MANN, *Clerk*,
By O. J. REYNOLDS.

BIGLOW, FLANDRAU & SQUIRES,
Plaintiff's Solicitors.

16 [Endorsed:] No. —. Circuit court of the United States, district of Minnesota. Chancery subpœna. Returnable first Monday in August, A. D. 1882. Filed July 17th, A. D. 1882. H. E. Mann, clerk, by O. J. Reynolds, dep'y. Biglow, Flandrau & Squires, plaintiff'- solicitor-.

UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

I hereby certify that I served the annexed chancery subpœna on the therein named defendant, The Minneapolis Gas Light Company, personally, by handing to and leaving with A. C. Rand, president of said Co., a true copy thereof, at Minneapolis, in said district, on the 17th day of July, 1882.

H. R. DENNY,
U. S. Marshal,
By CHAS. RIECHOW, *Deputy.*

U. S. marshal's fees, $3.20.

I hereby certify that the within is a true copy of the original subpœna in chancery delivered to me for service.

——— ———,
U. S. Marshal.

17 And afterwards, to wit, on the 17th day of July, A. D. 1882, the following appearance of defendants was filed in the clerk's office of our said court in words and figures as follows, to wit:

18 Circuit Court of the United States for the District of Minnesota.

KERR MURRAY M'F'G COMPANY, Plaintiff,
against
MINNEAPOLIS GAS LIGHT COMPANY, Defendant.

The clerk of this court will please enter my appearance as solicitor for the defendant in the above-entitled cause.

Yours, &c., P. M. BABCOCK,
Solicitor for Defendant.

Dated July 17th, 1882.

Filed July 18th, 1882.

H. E. MANN, *Clerk,*
By O. J. REYNOLDS, *Dep'y.*

19 And afterwards, to wit, on the 4th day of August, A. D. 1882, said defendants, by their said solicitors, filed their answer to the bill of complaint herein, which is in words and figures as follows, to wit:

20 Circuit Court of the United States, District of Minnesota. In Equity.

THE KERR MURRAY MANUFACTURING COMPANY

vs.

THE MINNEAPOLIS GAS LIGHT COMPANY.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, or other imperfections in the said complainant's said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, this defendant, answering, saith:

That the defendant admits the incorporation of the said complainant and defendant as alleged in the plaintiff's said bill.

Further answering the said bill, this defendant further admits that on or about the 19th day of February, 1881, said complainant finished all the labor it performed upon the manufacture and construction of the telescopic gas-holder mentioned and described in said bill, and admits that said gas-holder was of the dimensions, and admits that the contract price for said gas-holder was as alleged
21 in said bill.

The defendant denies that it was understood and agreed between said parties that this defendant was to pay to said complainant whatever costs or expense it was put to for lumber and material for scaffolding necessary in erecting said gas-holder or any part thereof; and this defendant avers and says as to whether the said complainant paid out & expended the sum of one hundred and thirty-eight dollars and twenty-five cents or any other sum for lumber and material in the erection and construction of said scaffolding this defendant has not any knowledge or information thereof sufficient to form a belief.

This defendant denies that said defendant was in all things manufactured, put up, and erected in a good, substantial, and workmanlike manner, and denies that the said gas-holder was fairly worth and of the value of $9,070.00, and avers that the same was of no greater value than the sum of $4,070.00.

Further answering, this defendant avers that it has paid said complainant for and on account of said gas-holder in cash the sum of four thousand nine hundred and fifty-three and $\frac{84}{100}$ dollars, and delivered to said complainant on account of said gas-holder coke of the reasonable worth and value of $1,440.46.

22 The defendant admits that it heretofore has and still does wholly refuse to pay said complainant the additional sum of $5,415.74, and denies the defendant is indebted to the complainant in the sum of $5,415.74, or in any sum whatever.

The defendant denies that said gas-holder was erected upon the lands of this defendant described in said bill or otherwise, & avers that said gas-holder was at the time of its construction by said complainant, ever since has been, and now is, personal property, and that

said gas-holder is situated in a building owned by this defendant which is situated upon the lands in said bill described.

The defendant denies that, pursuant to any law of the State of Minnesota, said complainant, at the time stated in said bill, or at any other time, made and filed the account in writing as alledged in said bill, and denies that said pretended account ever became a lien upon the lands described in said bill, or any part thereof.

2nd. Further answering said bill, the defendant avers that the said gas-holder mentioned and described in said bill was constructed & erected under an express contract made and entered into by and between the said complainant & defendant in the month of May, 1880, in the city of Minneapolis, Minnesota.

23 That by the terms of said contract it was expressly agreed by and between said complainant & defendant that said gas-holder should be built in exact accordance with certain plans, drawings, and specifications then and there exhibited to the said complainant, and which said plans, drawings, and specifications formed a part of said contract, and which are hereby referred to and made a part of this answer, and will be produced to said court upon the trial of the issues herein, as your honors may direct.

And the defendant further avers that said complainant did not construct and build said gas-holder according to the terms of said contract or according to said plans, drawings, & specifications, or in a good, workmanlike manner, but, on the contrary thereof, the said complainant built and constructed said gas-holder of such poor material and in such a careless, negligent, and unworkmanlike manner that the same has never been and is not now fit for the purposes for which it was built, and by reason of the aforesaid premises the said gas-holder has never worked in a manner contemplated by said contract made for the construction thereof, and always has been and still is an imperfect holder by reason of the same not having been built and constructed in accordance with said

24 contract, and that the said gas-holder is not now and never has been of any greater value than the sum of four thousand and seventy dollars, & that the fair difference in value between said gas-holder as constructed by said complainant and what would have been its value had it been constructed in accordance with the terms of said contract is the full sum of five thousand dollars.

And the defendant further avers that by the terms of said contract it was expressly agreed by and between said parties that said complainant should have the iron and other material necessary to build, construct, and fully complete said gas-holder in the city of Minneapolis within sixty days after being notified by this defendant to produce the same, and that in accordance therewith this defendant did on or about the 1st day of July, 1880, notify said complainant that it was ready for it to ship said material, and that, relying upon said contract and agreement, and expecting said complainant would fulfill the same, this defendant, at great cost & trouble, erected and had completed the building and tank in which said gas-holder was to be placed on the 1st day of September, 1880, so far as it had

agreed, but that complainant did not ship and produce
25 said material in said city of Minneapolis until in the winter of 1880 and 1881; and the defendant further avers and says that by the terms of said contract, under which the complainant undertook the construction of said gas-holder, the said complainant expressly agreed to build, construct, and fully complete said gas-holder on or before the 15th day of November, 1880, but that said complainant, disregarding its said contract and against the protest of this defendant, did not complete said gas-holder on or before the 15th day of November, 1880, and did not pretend to complete the same until the 19th day of February, 1881, & that this defendant has never consented to or waived the breach of said contract, as above alleged.

And the defendant further avers & says that during all the time hereinbefore stated this defendant was, ever since has been, and still is, engaged in the business & occupation of manufacturing, furnishing, & selling gas to said city of Minneapolis and the citizens thereof, and that had said complainant constructed & completed said gas-holder on or before said 15th day of November, 1880, as by said contract it agreed to do, this defendant would have made a
26 large amount of profit upon the gas it could and would have manufactured, furnished, and sold between said 15th day of November, 1880, and the 19th day of February, 1881, to wit, the sum of $6,757.89, and that by reason of the said complainant's not completing said gas-holder within the time specified in said contract this defendant was deprived of said profit, and was thereby directly damaged & injured in the full sum of $6,757.89.

All of which doings & pretenses of said complainant are contrary to equity and good conscience, and to the manifest wrong, injury, and oppression of the defendant.

Wherefore, by reason of the aforesaid premises, this defendant demands the judgement & decree of this honorable court:

First. That there is nothing due to the said complainant from this defendant by reason of any of the facts and allegations in the said bill contained; and

2nd. That there is justly due and owing to this defendant from said complainant, by reason of the facts alleged herein, the full sum and amount of $9,082.19, with interest since said 19th day of February, 1881, and that it may recover of said complainant said
27 sum of $9,082.19, with interest since said 19th day of February, 1881, together with its costs and disbursements of this action.

P. M. BABCOCK,
Solicitor for Defendant.

Filed August 4th, 1882.

H. E. MANN, *Clerk.*

28 And afterwards, to wit, on the 26th day of August, A. D. 1882, the complainant filed its replication to the answer herein, which is in words and figures as follows, to wit:

29 *The Replication of The Kerr Murray Manufacturing Company, Complainant, to the Answer of The Minneapolis Gas Light Company, Defendant.*

Circuit Court of the United States, District of Minnesota.

THE KERR MURRAY MANUFACTURING COMPANY

vs.

THE MINNEAPOLIS GAS LIGHT COMPANY.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant, without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to an-
30 swer and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

BIGLOW, FLANDRAU & SQUIRES,
Complainant's Solicitors

Filed Aug. 26, 1882.

H. E. MANN, *Clerk*,
By O. J. REYNOLDS, *Dep'y.*

31 Thereupon, upon the 15th day of September, A. D. 1882, a substitution of attorneys was filed in this cause, which is in words and figures as follows, to wit:

32 Circuit Court of the United States, District of Minnesota.

THE KERR MURRAY MANUFACTURING CO.

vs.

THE MINNEAPOLIS GAS LIGHT CO.

It is hereby stipulated that Babcock & Davis be substituted in my place and stead as solicitors for defendant in the above-entitled action.

Dated Sept. 12th, 1882.

P. M. BABCOCK,
Solicitor for Defendant.

Filed Sept. 15th, 1882.

H. E. MANN, *Clerk*,
By O. J. REYNOLDS, *Dep'y.*

33 Circuit Court of the United States, District of Minnesota.

THE KERR MURRAY MANUFACTURING CO.

vs.

THE MINNEAPOLIS GAS LIGHT CO.

SIRS: You will please take notice that we have been substituted in the place & stead of P. M. Babcock, Esq., as solicitors for defendant in the above-entitled action, and that all papers and notices therein must be served upon us at our office in the city of Minneapolis.

Yours, &c., BABCOCK & DAVIS,
Def't's Solicitors.

Dated Sept. 12th, 1882.

To Messrs. Biglow, Flandrau & Squires, plaintiff's solicitors, St. Paul, Minn.

Filed Sept. 15th, 1882.

H. E. MANN, *Clerk*,
By O. J. REYNOLDS, *Dep'y.*

34 And afterwards, to wit, on June 22nd, A. D. 1883, the following order was entered in the term minutes, page 11, viz:

KERR MURRAY MANUFACTURING COMPANY

vs.

MINNEAPOLIS GAS LIGHT COMPANY.

C. 217 chan.

Pursuant to verbal arrangement between the counsel for the parties to this suit, ordered that this cause be, and it is, set down for hearing on Friday, the 29th day of June, A. D. 1883, at the opening of court on that day or as soon thereafter as counsel can be heard.

Thereupon and pursuant to said order the following proceedings were had, and which appear of record in the term minutes, page 23, viz:

35 KERR MURRAY MANUFACTURING COMPANY

vs.

MINNEAPOLIS GAS LIGHT COMPANY.

C. 217 chan.

This cause, coming on for hearing upon the pleadings & proofs, was argued by the counsel of the respective parties and submitted and by the court taken under advisement.

Thereafter, and on the 1st day of October, A. D. 1883, the court filed its written opinion, which is in words and figures as follows, to wit:

36 United States Circuit Court, District of Minnesota. September 1883.

THE KERR MURRAY MANUFACTURING COMPANY

vs.

THE MINNEAPOLIS GAS LIGHT COMPANY.

Biglow, Flandrau & Squires, complainant's solicitors; Babcock & Davis, defendant's solicitors.

NELSON, *Judge:*

The complainant files its bill in equity to enforce a mechanic's lien under the laws of the State of Minnesota.

The following facts are found:

On May 28, 1880, the complainant concluded a verbal contract with the defendant for the construction & completion ready for use of a te-scopic gas-holder at Minneapolis according to certain written specifications furnished by the complainant. The defendant was to notify the complainant when to purchase the sheet-iron to be used in manufacturing the holder, and was to have the benefit of any fluctuation in the price of the iron between the date of the
37 contract and the day when notice was given. No time was fixed when the gas-holder should be completed ready for use, though the defendant was anxious it should be ready by November 1, 1880, or in the early fall. The contract price was $9,070.00, and the holder was completed and accepted about February 19th, 1881, and has been in part paid for. It is not constructed of the material required by the specifications, and does not fulfil in every respects the requirements of the contract.

The complainant, by the terms of the contract, was required to erect the gas-holder at Minneapolis and complete it ready for use, and this necessitated scaffolding as the work progressed. Although there is a conflict of testimony about furnishing the scaffolding, I am of the opinion that the complainant waived the clause in the original specifications which require "the gas company to furnish the necessary scaffolding, &c." The iron used in the manufacture of the holder is not of the kind and quality called for in the specifications, and the difference in price is ¾ of a cent per pound. The complainant did not furnish guard-rails & braces as required,
38 which were worth about $50.00, and has not paid for stoves it used during the construction of the holder, which were purchased by the defendant at the price of $61.30. It would also require an expenditure of $10.00 to properly adjust the holder, which slightly tipped. The defendant has paid on account of construction $3,792.74, to which complainant concedes in addition a credit of $894.00.

Conclusions.

In addition to the amount paid and conceded credits the defendant is entitled to and must be allowed the following items:

Stoves		61 30
Guard-rails & braces		50 00
Labor		10 00
Difference between the holder furnished and the one specified under contract		675 00
		$796 30

Summary:

Contract price of holder		$9,070 00
Payments	$3,792 74	
Conceded credits	894 00	
Further allowances	796 30	
	$5,483 04	5,483 04
		$3,586 96

A de-ree is ordered in favor of complainant for this sum, with interest from February 19th, 1881, & costs.

39 Filed Oct. 1st, 1883.

O. B. HILLIS, *Clerk.*

40 Pursuant to the aforesaid opinion the following order was entered of record in term minutes "F," page 95, to wit:

41 THE KERR MURRAY MANUFACTURING COMPANY
vs.
THE MINNEAPOLIS GAS LIGHT COMPANY.

C. 217 chan.

This cause having been heretofore submitted to the court upon the pleadings, proofs, and argument of counsel for the respective parties, and by the court taken under advisement; and the court, after due consideration thereof, and being duly advised in the premises, having filed its written opinion, it is ordered that a decree be entered herein pursuant thereto.

Thereupon, and on the 18th day of October, A. D. 1883, a final decree herein was entered in term minutes "F," page 145, which is in words and figures as follows, to wit:

42 Circuit Court of the United States for the District of Minnesota. In Equity.

THE KERR MURRAY MANUFACTURING COMPANY, Plaintiff,
against
THE MINNEAPOLIS GAS LIGHT COMPANY, Defendant.

This cause came on to be heard at this term of this court, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows:

That there is now due and owing from the defendant to the plain-

tiff in said cause on account of the construction of the gas-holder mentioned in the pleadings herein the sum of three thousand five hundred and eighty-six and $\frac{96}{100}$ dollars ($3,586.96), with interest thereon from the 19th day of February, A. D. 1881, at the rate of seven per cent. per annum, and that said plaintiff has a lien under the statutes of the State of Minnesota upon the land and premises described in the bill of complaint herein and hereinafter described for the said amount, with the interest as aforesaid and the costs of this suit.

And it is further ordered, adjudged, and decreed that all
43 and singular the said land and premises be sold in one parcel at public auction, under the direction of William A. Spencer, Esq., a master in chancery of this court, unless the said defendant or its assigns shall, previous to the day of sale, pay to the plaintiff or its solicitors the said sum of three thousand five hundred and eighty-six and $\frac{96}{100}$ dollars, with interest thereon from February 19, 1881, at the rate of seven per cent. per annum, together with the taxed costs of this suit and such other costs as shall have legally accrued under this decree; that the said sale be made according to the rules and practice of this court; that the said master give public notice of the time and place thereof by advertisement printed in some newspaper published in the city of St. Paul, in said district, at least once in each week for six successive weeks prior to the sale; that the said plaintiff may purchase at such sale, and that the said master execute to the purchaser at said sale a certificate of said purchase of said premises so sold and, after the expiration of the period allowed by the laws of the State of Minnesota for redemption from sales of real estate under foreclosure decrees, to wit, one year from the date of the order confirming the report of such sale, with such further time as is by said laws allowed to creditors to make such redemption, a deed of conveyance therefor.

44 There is hereby allowed to the master for his compensation in making such sale and receiving and paying out the proceeds thereof the sum of twenty-five dollars.

And it is further ordered, adjudged, and decreed that the said master shall pay and disburse the proceeds of said sale as follows, to wit:

1st. He shall pay in full the expenses of said sale and retain his compensation aforesaid, and shall pay to the said plaintiff, or its solicitors, the taxed costs of this suit, with interest thereon from the date of this decree.

2nd. He shall pay and discharge all taxes and assessments which shall then be due or unpaid on said premises, and all liens thereon for taxes and assessments.

3rd He shall pay to the plaintiff, or its solicitors, the said sum of three thousand five hundred and eighty-six and $\frac{96}{100}$ dollars, with interest thereon from the 19th day of February, A. D. 1881, at the rate of seven per cent. per annum, or so much thereof as the purchase-money of said premises will pay of the same, and that he take receipts for such payments and file the same with his report of sale, and that he bring the surplus moneys arising from such sale, if any

there be, into court to abide the further order of the court, and that he make a report of such sale and file it with the clerk of the
45 court with all convenient speed.

And, in case the said premises so sold shall not be redeemed within the period allowed by the laws of the State of Minnesota for redemption in such cases as aforesaid, that the purchaser at said sale of said premises be let into the possession thereof, and that the said defendant, or any persons or corporations who, since the filing of the affidavit for lien mentioned in said bill of complaint, have come into the possession of said premises so sold under it, deliver possession thereof to such purchaser on the production of the deed of said master.

And if, after the application of the proceeds of said sale as herein directed, any portion of the said amount so adjudged to be due to said plaintiff, or of the interest thereon, shall remain unsatisfied the said master shall specify the amount of such deficiency in his report of sale, and on the coming in and confirmation of said report the said defendant, which is personally liable for the payment of said debt, shall pay to the plaintiff the amount of such deficiency, with interest thereon from the day of such sale, at the rate of seven per cent. per annum, and that the plaintiff have execution therefor.

46 And it is further ordered, adjudged, and decreed that the said defendant and all parties claiming by, through, or under it do forever stand absolutely debarred and foreclosed of and from all lien, claim, interest, and equity of redemption of, in, and to said premises so sold, and every part and parcel thereof, unless the same shall be redeemed from such sale within the period allowed by the laws of the State of Minnesota for redemption in such cases as hereinabove mentioned.

The description of the premises hereinbefore referred to and directed to be sold is as follows, viz: All that certain lot, piece, or parcel of land situate, lying, and being in the city of Minneapolis, in the county of Hennepin, in the State of Minnesota, described as follows, to wit: Beginning at the southwest corner of section (24) twenty-four of township twenty-nine (29) of range twenty-four (24), according to the United States Government survey of the same; thence running north on the west line of said section twenty-four (24) to the bank of the Mississippi river; thence along said bank in a southeasterly direction one and seventy *and seventy* one-
47 hundredths chains ($1\frac{70}{100}$) to a stake; thence south to a stake or point on the south line of said section twenty-four (24); thence west on the south line of said section twenty-four (24) to the place of beginning, containing one (1) acre of land.

Dated October 18th, A. D. 1883.

R. R. NELSON, *Judge.*

Filed October 18th, 1883.

O. B. HILLIS, *Clerk.*

Ent. T. M. "F.," 145.

48 And afterwards, to wit, on October 25th, A. D. 1883, the defendant, by its solicitors, filed its petition praying an appeal

to the Supreme Court of the United States, which petition is in words and figures as follows, to wit:

49 Circuit Court of the United States, District of Minnesota.

THE KERR MURRAY MANUFACTURING COMPANY, Complainants,

vs.

THE MINNEAPOLIS GAS LIGHT COMPANY, Defendants.

The above named defendant, conceiving itself aggrieved by the final decree entered on the 18th day of October, 1883, in the above-entitled cause, hereby appeals therefrom to the Supreme Court of the United States, and it prays that this its appeal may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court.

BABCOCK & DAVIS,
Solicitors for Defendants.

Filed Oct. 25th, 1883.

O. B. HILLIS, *Clerk.*

50 And on said day the defendant filed its appeal bond in words and figures as follows, to wit:

51 Circuit Court of the United States, District of Minnesota.

THE KERR MURRAY MANUFACTURING COMPANY, Complainant,

vs.

THE MINNEAPOLIS GAS LIGHT COMPANY, Defendant.

Know all men by these presents that The Minneapolis Gas Light Company, defendant above named, as principal, and Alonzo C. Rand and Samuel Hill, all of the city of Minneapolis, State of Minnesota, as sureties, are held and firmly bound unto The Kerr Murray Manufacturing Company, complainant above named, in the penal sum of six thousand dollars, lawful money of the United States; for the payment of which sum, well and truly to be made, we bind ourselves, the said principal, its successors, and the said sureties, their heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and sealed this 24th day of October, 1883.

Whereas, on the 18th day of October, 1883, a final decree was made and entered in the above-entitled action in favor of the
52 above-named complainant, and ag-rieved said defendant, and the said defendant has appealed from such final decree to the Supreme Court of the United States:

Now, therefore, if the said defendant and appellant shall prosecute its appeal with effect and pay the amount of damages and costs and damages rendered and to be rendered in case the decree shall be affirmed, then this obligation to be null and void; otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 24th day of October, 1883.

THE MINNEAPOLIS GAS LIGHT CO.,
By RUFUS R. RAND, *Sec'y.* [SEAL.]
ALONZO C. RAND. [SEAL.]
SAMUEL HILL. [SEAL.]

In presence of—
CHAS. H. BABCOCK &
H. W. BROWN.

STATE OF MINNESOTA, } *ss:*
County of Hennepin, }

Be it remembered that on this 24th day of October, 1883, before me personally came Rufus R. Rand, as secretary of the Minneapolis Gas Light Company, and Alonzo C. Rand and Samuel Hill, the sureties above named, and each for himself acknowledged the execution of the foregoing instrument as his free act and deed, for the uses and purposes therein expressed.

[SEAL.] CHAS. H. BABCOCK,
Notary Public, Hennepin County, Minnesota.

53 STATE OF MINNESOTA, } *ss:*
County of Hennepin, }

Alonzo C. Rand and Samuel Hill came personally before me, and, being duly sworn, doth each for himself depose and say that he is one of the sureties named in the foregoing obligation; that he is a resident and freeholder of and in the State of Minnesota, and worth the sum of six thousand dollars over and above his debts and liabilities and exclusive of his property exempt from execution.

ALONZO C. RAND. [SEAL.]
SAMUEL HILL. [SEAL.]

Subscribed and sworn to this 24th day of October, 1883, before me—

[SEAL.] CHAS. H. BABCOCK,
Notary Public, Hennepin County, Minnesota.

Filed October 25th, 1883.

O. B. HILLIS, *Clerk.*

54 Thereupon the court approved said bond and allowed said appeal, the order granting the same appearing of record of said date, and entered in term minutes F, page 151, in words and figures as follows, viz:

55 THE KERR MURRAY MANUFACTURING COMPANY
vs.
THE MINNEAPOLIS GAS LIGHT COMPANY.

C. 217 chan.

A final decree having been rendered in this cause at this June

term, on the eighteenth day of October, 1883, now this day comes the defendant herein, by its attorneys, Babcock and Davis, and presents to the court a petition praying an appeal to the Supreme Court of the United States; and a citation having issued in said cause, due service of the same being admitted thereon by counsel for plaintiff, and the court being fully advised in the premises, fixes the appeal bond, to operate as a supercedeas, in the sum of six thousand dollars ($6,000.00), and said defendant thereupon presents a good and sufficient bond in the penal sum aforesaid, and, on inspection thereof, the court approves the same. Whereupon, and in consideration of the premises aforesaid, it is hereby ordered that said appeal be, and the same is hereby, allowed.

56 Circuit Court of the United States, District of Minnesota.

THE KERR MURRAY MANUFACTURING COMPANY, Complainant,
vs.
THE MINNEAPOLIS GAS LIGHT COMPANY, Defendant.

The defendant in the above-entitled cause having this day presented to the undersigned judge of said court an application for an appeal to the Supreme Court of the United States from the final decree made and entered in said cause on the 18th day of October, 1883, and a citation therein having been duly issued and served upon the solicitors for said complainant, and the said defendant having presented to the undersigned a bond in the penal sum of six thousand dollars, conditioned as required by law, and the said bond and the surety therein having been approved by this court, and the said bond being sufficient in amount to secure the payment of said decree, with interest and costs, and the said defendant having prayed the court for the allowance of said appeal, and the
57 court being fully advised in the premises:

On motion of Messrs. Babcock & Davis, solicitors for said defendant, it is ordered that the said appeal be, and the same hereby is, allowed and a supersedeas granted therein.

Dated Oct. 25, 1883.

R. R. NELSON, *Judge.*

Filed Oct. 25th, 1883.

O. B. HILLIS, *Clerk.*

58 Thereafter, and on January 2, '84, the following stipulation was made and filed in said cause, viz:

59 United States Circuit Court, District of Minnesota. In Equity.

THE KERR MURRAY MANUFACTURING COMPANY
vs.
THE MINNEAPOLIS GAS LIGHT COMPANY.

It is hereby stipulated that the following agreed statement of the case and of the testimony in the above-entitled cause, with the ob-

jections & stipulations contained therein, the said testimony being an abstract in narrative form of the depositions on file in said cause, and the whole having been prepared and used by the parties on the hearing of said cause in the United States circuit court, may be certified and returned by the clerk of said circuit court on the appeal which has been taken by the defendant in said cause to the Supreme Court of the United States in place of the said depositions, and as the testimony in full in said cause, excepting that a copy of the specifications referred to in said testimony (being Exhibit 11 to the deposition of Alfred D. Cressler) shall be added to said testimony and returned therewith.

Dated January 2nd, A. D. 1884.

BIGLOW, FLANDRAU & SQUIRES,
Plaintiff's Solicitors.

BABCOCK & DAVIS. *Defendant's Solicitors.*

Filed Jan'y 2, '84.

O. B. HILLIS, *Clerk.*

60 Agreed statement of the case and of the testimony in the above-entitled cause stipulated to be certified and returned by the clerk of this court to the Supreme Court of the United States, on the appeal taken herein, in place of the original depositions, and as the testimony in full in this cause under the aforesaid stipulation.

The bill avers that on or about the 19th day of February, 1881, at the instance and request of the defendant, the plaintiff erected and constructed for the defendant one telescopic gas-holder, at the city of Minneapolis, Minnesota, at the agreed price of $9,070, and that said gas-holder was in all things manufactured, put up, and erected in a good, substantial, and workmanlike manner, and was reasonably worth said sum of $9,070; that the defendant also agreed to pay the plaintiff the expense of labor and material expended by the plaintiff in erecting the scaffolding for the construction of said gas-holder, and that said cost was the sum of $138.25, and that said gas-holder was erected upon certain described real estate belonging to defendant; that the defendant has paid on account of the construction of said gas-holder and cost of said
61 scaffolding the sum of $3,792.74, and no more, and demands judgment against the defendant for the sum of $5,415.51, and that such judgment may be decreed to be a lien upon the said gas-holder and the lands upon which the same is situated.

II.

The answer admits that the contract price of said gas-holder was the sum of $9,070; denies that the defendant agreed to pay for such scaffolding, and denies that said gas-holder was worth the sum of $9,070, and avers that the same was of no greater value than the sum of $4,070; avers that the defendant has paid the plaintiff on account of said gas-holder in cash the sum of $4,953.84; that the

defendant delivered the plaintiff coke on account of said gas-holder of the value of $1,440.46; denies that said gas-holder was erected upon the lands of the defendant, and avers that the same is personal property, and avers that the same was erected and constructed under an express contract, by the terms of which said gas-holder was to be constructed in exact accordance with certain plans and specifications which form a part of said contract; avers that said gas-holder was not constructed according to said contract or said plans and specifications, or in a good and workmanlike manner; avers that by reason of the same not having been constructed according to said contract, plans, and specifications the same has never been fit for the purpose for which it was built, and has never worked in a manner contemplated by said contract, and has always been an imperfect holder; avers that the difference in value between said holder as constructed and what it would have been if constructed in accordance with said contract is the sum of $5,000; avers that by the terms of said contract it was expressly agreed that the plaintiff should have the iron and other material necessary to build, construct and fully complete said holder in the city of Minneapolis within sixty days after being notified by the defendant to produce the same, and to fully complete said gas-holder on or before the 15th day of November, 1880.

That the defendant notified the plaintiff on or about the 1st day of July, 1880, that it was ready for it to ship said mate-
62 rial, and that the defendant, at great cost, erected and fully completed the tank and building in which said gas-holder was to be placed on the 1st day of September, 1880, so far as the defendant had agreed to construct the same, but that the plaintiff, disregarding its contract, did not ship to and produce said material at the city of Minneapolis until the winter of 1880 and 1881, and did not pretend to have completed said holder until the 19th day of February, 1881, and that the defendant has never consented to or waived the breach of said contract, as above alleged; avers that between the 15th day of November, 1880, and the 19th day of February, 1881, the defendant was engaged in the business of manufacturing, furnishing, and selling gas to the city of Minneapolis and the citizens thereof, and that, had the plaintiff constructed and completed said gas-holder on or before said 15th day of November, 1880, the defendant would have made a large amount of profit upon the gas it could and would have manufactured, furnished, and sold between said 15th day of November, 1880, and the 19th day of February, 1881, to wit, the sum of $6,757.89, and that, by reason of said plaintiff not completing said gas-holder within the time specified in the contract, the defendant was deprived of such profit and was thereby directly damaged in the sum of $6,757.89, and demands judgment against the plaintiff for the sum of $9,082.19, with interest thereon since the 19th day of February, 1881.

The replication denies all the averments of the answer.

Plaintiff's claim in the pleadings is:

Contract price of holder	$9,070 00
Cost of scaffolding	138 25
	$9,208 25
Cash on account	3,792 74
Balance due	$5,415 51

Defendant's claim in the pleadings is:

Contract price of holder			$9,070
Difference in value of holder by reason of its not being constructed according to the contract		$5,000 00	
63 Cash paid on account of holder		4,953 84	
Coke delivered to plaintiff on account of holder		1,440 46	
Loss of profits on sale of gas between November 15, 1880, and February 19, 1881		6,757 00	
Total		$18,151 30	$9,070

Balance due defendant, $9,081,30.

Defendant concedes that $827.74 of the draft of $2,002.50 was in payment of the castings mentioned in the contract attached to the deposition of Mr. Brown, as stated in the second deposition of Mr. Cressler; plaintiff concedes that the defendant should have credit, in addition to that given in the bill, as follows, viz:

Paid freight, &c.	$500 50
Overcharged for valve	60 00
Coke furnished at holder	323 50
	$894 00

* (See second deposition of Mr. Cressler.)

The issues remaining are:

First.

Should the defendant have credit for the coke used under the benches at the works and at the Sixth-street station between November 15, 1880, and February 19, 1881, amounting to $226.14?

Second.

Should the defendant have credit for the amount paid for the stoves, amounting to the sum of $61.30?

* It is conceded that the whole value of the coke furnished was $549.64, instead of $1,440.46, as claimed by defendant in pleadings. See Brown's testimony.

Third.

Should the defendant pay the cost of erecting the scaffolding, amounting to the sum of $138.25?

Fourth.

Did the plaintiff agree to construct and complete the gas-holder on or before the 15th day of November, 1880?

Fifth.

Was the gas-holder constructed of the material and in the manner specified in the contract?

64 Sixth.

Was the gas-holder, as constructed, of any less value than it would have been had it been constructed of the material and in the manner specified in the contract; and, if so, of how much less value?

Seventh.

Did the defendant sustain damage by reason of the loss of profits upon the manufacture and sale of gas between the 15th day of November, 1880, and the 19th day of February, 1881, by reason of the plaintiff not having completed said gas-holder on the 15th day of November; and, if so, what was the amount of such loss?

The following is an abstract and the substance of the testimony adduced:

ALFRED D. CRESSLER testified for the plaintiff as follows:

Kerr Murray died May 6th, 1880. Prior to his death I had charge of his books, and went on the road and made contracts, and he managed his business. Since his death I have been the general manager of the Kerr Murray Manufacturing Company. The plaintiff manufactures gas apparatus, gas-holders, engines, and boilers, and does general foundry work. Prior to May 3d, 1880, the plaintiff had some correspondence with the defendant respecting the construction of the gas-holder (see correspondence, Exhibits 3, 4, 5), and on that day I sent to the defendant the plans and specifications for the holder in evidence. I went to Minneapolis May 28, 1880, and made a contract with it for two benches of sixes. Mr. Brown, the superintendent of the defendant, informed me that the defendant would build the tank and building according to the plans and specifications we had sent them; that we were to have the contract for the holder; that he would inform us when to order the sheet-iron, as he desired the benefit of the fluctuations in prices; that we might go ahead and make the tank connections, and desired us to send them out as soon as possible, so that they could build them into the tank as soon as it was excavated and ready to lay brick-work. The tank connections are included in our specifications, and form part of
65 the contract for the holder, and are included in our contract

price. He informed me that the brick contractors had formed a pool on brick, and he did not know how soon he would be able to get them, as he would not pay their price, as he had all winter to build the holder in; he had plenty of coke to keep the men warm. There was nothing said at that time when the holder was to be completed, as he had plenty of time. At that time Mr. Brown gave me the contract for building the holder, with the exception that he was to notify me when to purchase the iron.

There was no time fixed within which it was to be completed in awarding the contract to the plaintiff. I left Minneapolis that night. I entered the order in our order-book immediately upon arriving home, which was about June 9 or 10. (Copy of order-book, marked "Exhibit 7," put in evidence, under objection of defendant.) I then delivered the orders to the different departments of our shops for the ells, tees, drips, plugs, tank-wall plates, valves, anchors for tank-plates, base plates for guide-rails, foundation plates, and foundation bolts. All of the above parts of the holder had to be made specially for the work, as we had none in stock. They were of a character that were not kept in stock. Those specified as 12-inch we made new patterns for. We commenced work immediately on these articles, and cast portions of them each day thereafter until they were completed, and a majority of them were completed prior to June 28, 1880. In other words, a majority of the work which could be completed in our shops prior to receiving the notification to purchase the iron was done prior to that date.

I went to Cincinnati about the 15th of June and made a contract for the sheet-iron on a sliding scale of the same nature as the contract with the defendant as to fluctuation in prices. We were to notify them as soon as we received word from the defendant to purchase the iron. My object in this was to give us priority over other orders that might come in. I went from Cincinnati to Pittsburgh, and placed the order for the shape-iron—*i. e.*, angle iron, 66 channel iron, tie iron, and flat bar-iron. They agreed to ship the iron as soon as possible. After getting home there was further correspondence between Mr. Brown and myself. (See correspondence, Exhibits 8, 9, 10.)

About July 3, 1880, I received notification from the defendant to purchase the iron according to contract, as to fluctuation in prices, and I immediately notified the Cincinnati parties to make and ship the iron at the earliest date and at the then current price. We did not notify the Pittsburgh parties, as the order already given was an absolute one. As soon as the iron was received, or portions of it, we put our men at work constructing it, and completed the work as rapidly as possible. The holder was completed about February 19, 1881, and put in use by the defendant.

(Specifications marked "Exhibit 11" put in evidence and shown witness.)

Witness says: The words "the gas company to furnish the necessary scaffolding and to keep the tank free from water" have been torn off since the same was sent to the defendant. The holder was

in every respect constructed in accordance with the specifications, except in some minor details, which did not, in any respect, affect the strength or durability of the holder.

NOTE.—Mr. Cressler testifies to each item of the specifications in detail as to material and construction.

I have been engaged in this business since 1875.

If it is a fact that the holder tips slightly, that does not affect the substantial working of the holder, and can be adjusted by the shipping of the top and button guide-rollers at an expense of about two days' time of one man.

(The last above testimony is taken under the objection of the defendant that the same is incompetent under the pleadings.)

I did not consent to the tearing off from the specifications of the clause requiring the defendant to furnish scaffolding, and did not know until now that it had been done. We paid for such scaffolding $138.25.

67 The real value of the holder, as constructed and completed, was the sum of $9,070.

(The testimony last above is subject to the objection of the defendant that the same is incompetent and immaterial, and especially as the plaintiff sues upon a special contract.)

Cross-examined:

All the business connected with the holder was conducted by Mr. Brown and myself. I did not consider that we were taking the matter up where Mr. Murray had left it. When I went to Minneapolis, May 28th, 1880, I had seen the letter from the defendant dated April 11th, 1880, but did not know at that time that the defendant wanted the holder ready for use November 1st, 1880. Mr. Brown stated that he would give us a contract for the holder and would go to work at once and build his tank according to our specifications; that we should get out the tank connections, ells, tees, and drips; that he would notify us when to order the sheet-iron; that he did not know how soon he would be able to build the tank; that he would not pay what they then asked for brick, as he had all winter in which to build his holder and plenty of coke to keep the men warm. We assented to this, and stated we would place the order for tank connections on our books when I got home, and ship them at the same time we shipped his bench castings. When I was at Minneapolis I knew that the defendant was negotiating with other parties for the building of this holder. The reason why I went to Cincinnati and Pittsburgh soon after my return from Minneapolis was for the purpose of placing the order for the iron in such a way that we could avail ourselves of it when the defendant should order us to purchase it. I wrote the letter (Ex. 10) to get defendant to order us to purchase the iron. The contract was given by Mr. Brown with the understanding that he should name the date the iron was to be ordered. When I went to Cincinnati I had an order for a holder from the defendant, but not the order to purchase the iron.

(Witness then identified a number of letters sent and received
68 between the plaintiff and defendant, attached to his deposition, No. 12 to 48, inclusive, and testified that Exhibits 39, 42, 43, and 44 were written by their book-keeper during witness' absence.

The letters dated July 1st and 3d, 1880, and April 21, 1881, were received under the plaintiff's objection that the same were incompetent and immaterial.)

After we shipped the material for the holder to Minneapolis, and about November 21, 1880, we sent two men to work upon it. One of those men remained there, the other did not. In December we sent three other men. We regarded that as a sufficient force from the shops, they being experienced men. Annealed iron differs from other iron by being softer and more desirable for gas-holders.

If, when completed, the holder leaked gas it would be constructed according to the contract, with the exception of having to have a coat of paint.

The guide-wheels should run upon the guide-rails. If some of the guide-wheels do not run upon the guide-rails it would not be built according to the contract. If the holder tips five or six inches it would not be built according to the contract.

Re-examination :

When I was in Minneapolis May 28th, 1880, at the time of making the contract, I did not know, before making the contract, that the defendant wanted the holder completed by November 1st, for the reason that Mr. Brown did not know when he could get material or how soon he could build the tank, and stated we had all winter to build the holder. That was the reason no time limit was fixed in the contract. The conversation with Mr. Brown, which resulted in the making of the contract, occurred in his buggy, driving from the gas-works to their up-town office. The contract was awarded to us prior to reaching their up-town office. There was no person present during that conversation except Mr. Brown and myself. It was not a fact, as stated in Mr. Brown's letter of August 13th, 1880 (Exhibit No. 16), that he was ready for us at that date. As the tank and building stood on August 23, 1880, it was not ready for us, as stated in Mr. Brown's letter of that date, and we could not have gone to work then. During 1880 we were
69 doing other work for defendant, and our correspondence during the year refers to other work as well as to the holder. In letter of September 25, 1880 (Ex. 25), I state " I placed the order for six-inch channel iron for your holder on July." The order was placed June 26, when I was in Pittsburgh, for delivery in July. It was an absolute order but a July delivery. Our book-keeper wrote the letter of October 27, 18-0 (Ex. 28), I think, from my dictation. My understanding was that we were to have all winter to complete the holder, and when I spoke of " contract time " in that letter I meant that time. There was no fixed date when the holder was to be completed. The letter of December 13, 1880 (Ex. 39), was written by our book-keeper during my absence. In that letter, in using the

language, "certainly not much later than the time (Christmas) you originally gave us to have it ready," the book-keeper expresses my understanding that we were to have all winter to complete it, and in speaking of Christmas had, no doubt, heard me urging the men to have the work out by Christmas. It was our desire to have the job completed as early as possible. (The last testimony was taken under objection by defendant.) The letter of January 19, 1881 (Ex. 47), came to us by Mr. Dickey, our foreman. It was handed to him at Minneapolis, and did not reach us until the latter part of February. We shipped to defendant during July, 1880, some of the material for this holder. On July 8, we shipped the ten and twelve inch gas-pipe for tank connections, and on July 17, we shipped the ells, tees and drips. Two men was the usual number sent out by us from the shop to construct holders. The two men we first sent to Minneapolis were authorized to employ the necessary help. We sent four men from our shops to work on this holder, which is a larger force than we usually send on such a job.

Recross-examination:

Mr. Waltermuth was our first foreman on this job. He remained there but a few days, and after he left Mr. Dickey was our foreman and had charge of the work. All I know about the tank and building not being ready for the holder in August and September, as I have testified, was derived from the letters of
70 Mr. Brown. Before I went to Minneapolis in May, 1880, I had read the correspondence between Mr. Brown and Mr. Murray, but I knew nothing about the difficulty in obtaining brick until I arrived there.

WM. CREIGHTON, a witness for plaintiff, testified:

I am a machinist by trade and have been for thirty-seven years. I have been engaged in the manufacture of gas apparatus since 1873. I am foreman of the machine-shops and superintendent of the works of plaintiff, and have been since Mr. Murray's death, and was Mr. Murray's foreman before his death. I had charge of the construction of the holder made for the defendant and am familiar with the material used and manner in which it was constructed. The holder was constructed of the materials and in the manner called for by the specifications, except in some minor details, which did not affect the strength, durability, or working of the holder. (NOTE.—Mr. Creighton testifies in detail as to each item of the specifications.) Under the head of "Sundries" in the specifications everything was constructed as called for by the specifications.

Cross-examination:

I was superintendent at the shops of the defendant. I did not go to Minneapolis to superintend the construction of the holder there. I have never seen it there. I do not know of my own knowledge whether the holder had when finished a coat of paint or not, nor can I say that when the holder was completed it was round and true

and perfectly gas-tight and worked smoothly. I do not know whether annealed iron was used or not in the construction of the holder.

HARMON J. REMMERT, a witness for plaintiff, testified:

I am foreman of the pattern and boiler shops of the plaintiff and have been for the past nine years. I commenced learning my trade in 1862.

(It was here stipulated by the respective parties that the testimony of the witness Remmert as to the material out of which
71 and the manner in which the holder in question was constructed is the same in all respects as that contained in the deposition of William Creighton.)

I went to Minneapolis the latter part of January, 1882. I examined the holder as far as I could get around the outside. The holder was about two-thirds up, and I found it in good working order. It was in use at that time by the defendant. It tipped on one side, for the reason that on the opposite side the counter-weight was off and was lying there. The tipping could, in my opinion, be corrected by putting on the counter-weight. It would probably take about half an hour to do this. It was in good working order, so far as could be seen, in all other respects. I could not detect any leakage of gas. It was about two-thirds full of gas. I could not smell any gas. I had a conversation (under objection of defendant) with a man who called himself foreman of the retort-house of the defendant. He told me that the holder was all right in every respect; had no trouble with it from the time they turned in the gas.

I saw another man who called himself foreman of the purifying house of the defendant. (Under objection of defendant.) He said the holder was a good job, with the exception of a few small leaks on top at the crown. I was there about all day making the examination. The man who called himself foreman of the retort-house was about the retort-house; had charge of it and gave orders to the men during the time I was there. The man who called himself foreman of the purifying house had charge of it and took me about it.

I have examined similar holders at St. Louis, Louisville, Council Bluffs, Omaha, and Des Moines, and consider the holder of defendant (under objection of defendant) equal to those in its construction and working. I made the other examinations about two weeks after I was at Minneapolis.

Cross-examination:

When I went to Minneapolis I did not call at the office of the defendant, and did not see any of its officers. I went there to examine the holder, because complaint had been made that it did not work good. I was introduced to a Mr. Rand. I do not know the name of the foreman of the retort or purifying house. I was in the holder building about an hour.

72 ALFRED D. CRESSLER recalled:

In the account filed by the plaintiff for a lien, a balance of $5,415.51 was stated to be due from the defendant. The defendant should also have credit for freightage, &c., amounting to $500.50, reducing the amount due from the defendant to that extent.

As I have stated, I understood Mr. Brown's remark that they had an abundance of coke to keep the men warm all winter to mean that the coke would be furnished without expense to the plaintiff, although there was no more than this remark to lead me to that conclusion. If, therefore, in any account that may be taken, the plaintiff is to be charged for coke, I wish to state that on the supposition that the account furnished by the defendant contains the true amount of coke used, the plaintiff should be charged for only $323.50, and not $549.64, as $323.50 was all the coke that was used at the holder, the balance being used at the Sixth-street station, and under the benches in the retort-house of the defendant.

The items amounting to $61.30, as shown by the statement filed, were for stoves. These stoves were purchased by the defendant and used by our men during the erection of the holder, and at the completion of the holder were left with the defendant, and if the plaintiff is to be charged with them at all it should also have credit for the value of the stoves after such use. I think the value of the stoves when we were through using them was $40.

The draft of $2,002.50, dated November 4, 1880, was to pay for bench castings, amounting to $827.24, and the balance of $1,172.76 only was to apply on the holder.

The defendant should have a further credit of $60 for a 12-inch valve which was included in and covered by the price for the holder, and which was charged to the defendant by a mistake of the bookkeeper.

The claim of the defendant for the loss of profit on the manufacture and sale of gas I consider unwarranted for two reasons—first, the holder was not to be completed at any certain time; second, even under the defendant's contention that I am in error,

73 and the time was fixed, as I understand the claim it is based upon an inability to maintain a pressure of two and one-half inches. While such a pressure may be desirable in the interest of persons selling gas, it is neither necessary or desirable in the interest of the consumer, and in my opinion such pressure is robbery to the latter. (The last above evidence is under the objection of the defendant.)

Cross-examination:

When I made the contract for the benches at Minneapolis, May 28th, 1880, that contract was made in the office of the defendant. I think I was in the office of the defendant at that time an hour and a half or two hours. At that time we also talked over the plans for the holder, tank, and building.

Re-examination:

At the time we talked over the plans in the office we had not yet made the contract for the holder, and had not yet been out to the gas-works. The contract for the holder was made on the same day.

R. T. COVERDALE, a witness for plaintiff, testified:

I reside at Cincinnati. I am a gas engineer and contractor, and have been for thirty years. I went to Minneapolis December 8th or 9th, 1882, at the request of the plaintiff, for the purpose of inspecting and learning what I could concerning the holder in question. I visited the works of the defendant, and met Mr. W. W. Rand, the local superintendent. He showed me the holder. One of the counter-balances was on the ground, and he said the gas-holder was heavier on one side than the other, and that he had to take the weight off. He said the holder worked well then, but that they had had a good deal of trouble with it; had trouble with it when it was first made. He said Mr. Dickey put the holder together. I told him that Dickey had put a holder up for me at Des Moines. He said Mr. Dickey was a good man, a good workman, and the best that he had ever seen. I asked him how they came to have any trouble with it, and he said Mr. Dickey told him it was the first telescopic holder the plaintiff had made, and that he had not got the hang of it. I asked him whether the holder was tight, saying that
74 they had always done good jobs for me. He said it leaked a little at first. I told him they had always put the best iron in the holders they had made for me. He said he believed the iron in this holder was all right. The holder was in use at the time I saw it, and I should judge was more than two-thirds full. The house in which the holder was situated was closed up, and I could detect no smell of leakage of gas. If the holder had been leaking to any considerable amount I could have detected it.

(All the above evidence under the objection of defendant.)

It is my opinion that there was no great fault in the building of the holder if it could be corrected by the removal of the weight from one column. The holder was in tip-top shape and seemed to be as good a holder as I ever saw, and I have seen a great many and have had as many as forty constructed for myself. The iron was in good shape; it was well riveted up and as free from buckles as any holder I ever saw.

Cross-examination:

When I went to Minneapolis I did not call at the defendant's office and did not see any of the officials of the defendant except W. W. Rand. I went down to the gas-works about 1 or 2 o'clock in the afternoon and asked for Mr. Rand, the superintendent. He unlocked the door of the building and showed me the holder. I think I was in the holder building about half or three-quarters of an hour. I did not climb up the ladder at the side of the building. I did not climb up to the curb or top of the cup of the outer section. I

could not tell whether the gas-holder rode smoothly or whether it tipped. I did not examine the crown of the holder, and cannot tell whether it ever leaked or not. I did not examine to ascertain whether the guide-wheels ran upon the guide-rails, and cannot, therefore, say whether all of them ran upon the guide-rails or not. I cannot tell whether the taking off of the counter-balance made the holder ride smoothly or not. I did not examine the friction-plates of the inner section, and cannot, therefore, say whether they were true and plumb or not.

ROBERT B. DICKEY, a witness for plaintiff, testified:

I had charge of building the holder in question. I went
75 to Minneapolis to work on the holder about December 5th, or 6th, 1880, and remained there until February 21st, 1881. The holder was completed February 19th, 1881. There were three men besides myself from plaintiff's shops, and we hired about ten more at Minneapolis. The holder was constructed of good material, better than the average of such holders; the iron was annealed sheet-iron, and worked smoothly and nicely; it was straight, true, level, and smooth, and free from buckles. When the holder was completed it worked smoothly and evenly. Vertical stiffeners were put in; they were straight, according to the specifications. The wall plates were sent to Minneapolis some time in July, 1880; they were fastened to the walls by a wrought-iron anchor, with thread in plate to keep them in place, by the bricklayers in the employ of the defendant. I found them and the tank connections built into the walls and in position when I arrived there. They are both necessary parts of the holder. The tank connections admit the gas to and from the holder. I received a letter from Mr. Rand about the time the holder was completed, addressed to A. D. Cressler. Mr. Brown told me about a month before this that he had left a letter at the office for the plaintiff, which I suppose was the same one handed me. I mailed it without reading it. The scaffolding and stoves that were used in the construction of the holder were left there, and were worth from $80 to $100. The workmanship of the holder was good, the material first-class, and the holder worked well when completed. I have been engaged in the construction of gas-holders for nine years, and erected them in nearly every State, and a number in some of them, and had exclusive charge of their construction, and have visited other works to examine their material, workmanship, and construction.

IGNATIUS DROEGE, a witness for plaintiff, testified:

I have been vice-president of the Licking Rolling Mill Company of Cincinnati since April 1st, 1878, and have been connected with the mill since 1851, and purchased it in 1877.

Prior to June 28th, 1880, we contracted with the plaintiff to furnished annealed sheet-iron for this holder. Deliveries were to be made at Fort Wayne as soon as they could be made. The
76 sheets were delivered by us at the railroad depot in Cincinnati. Some delay attended shipments by reason of accidents

to our machinery, though nothing unusual. All sheets so furnished and shipped were of annealed iron, and of first-class quality of boiled annealed iron.

Cross-examination:

The contract for the iron was verbal. I did not deliver the iron personally, but know my men delivered it; but whether the iron was shipped to Minneapolis and used in the construction of a gas-holder at that place, I do not know.

All gas-holder iron is annealed during the process of manufacture, unless stipulated to the contrary in the order. This order was for annealed iron. The iron was subjected to the same general inspection by me that is given to all iron that leaves our works. I knew the quality of the material out of which the iron was made before its manufacture, and it was first-class. Annealed iron is softer, more pliable, freer from wavy surfaces, more level, and flatter than unannealed iron.

Defendant's Evidence.

HARVEY W. BROWN:

I was superintendent of the defendant from March, 1875, to March, 1882, and had general charge of the management of its affairs. I have had connection with the business of constructing and operating of gas-works and the manufacture of gas in all its branches for the past twenty years. I am acquainted with Alfred D. Cressler, the manager of the plaintiff. I first met him in Minneapolis, in May, 1880. After negotiating with Kerr Murray, as shown by the correspondence in evidence, Mr. Cressler came to Minneapolis to complete the contract for the work in question. He spent one day there, and that was the only time I ever saw him. I asked him if he was prepared to take up the negotiations as conducted with Kerr Murray before his death, and carry them out. He said that he was; that he came there for that purpose. I told him at that time that we should award the contract to him, providing we could agree as to the time the holder was to be constructed. I then explained to him that we were to take the chances on the price of iron; that it was then too high. He said that all he wanted was four months to complete the holder from the time that we ordered him to go ahead—that is to say, he wanted sixty days to get the iron and get it on the ground at Minneapolis, and sixty days further time to fully complete the work. I told him that our necessities were such
77 that we must have a holder by the first of November, 1880, or in the early fall. He said that of course that would depend upon the time when he got the order to go ahead; that he could do it safely in four months from the time he got the order to do it, and that he could not do it sooner. We then agreed upon a price, as shown in the letters which are in evidence.

Nothing was said in the conversation with Mr. Cressler or any one else about the plaintiffs having all the following winter to complete the construction of the holder. I never assented to any terms as to time when the construction was to be completed or the modifica-

tions different from before narrated here. All negotiations for the holder, on the part of the defendant, were conducted by myself. This conversation with Mr. Cressler was had at our gas-works and at our general office on Nicollet avenue. W. W. Rand, foreman of the works, John Hanley, and James Langon were present when we had the conversation at the works. The conversation was first had at the works. At the office we discussed the plans and specifications as furnished by the plaintiff, and this conversation occupied something like two hours' time.

Attention of witness called to specifications (Exhibit No. 11). Witness says:

The words "the gas company to furnish the necessary scaffolding and to keep the tank free from water" were in the original specifications. My memory of that clause is this: I said to Mr. Cressler that it was unusual and out of character to ask the gas company to furnish such material, and there was no reason why it should furnish it; that he contracted to do the work, and he should furnish scaffolding just as much as any other material. Cressler said it occurred to them in drawing up the specifications that we might have old lumber around sufficient for that scaffolding; that if we had not it was immaterial, and he would waive that point. I accordingly tore that clause off of the specifications. I think it was done in Mr. Cressler's presence, but am not sure; at any rate, Mr. Cressler assented to it. The defendant never agreed to furnish material for or pay for the construction of the scaffolding, and the plaintiff never made any demand on the defendant for the material for constructing the scaffolding. Within a day or two after Mr. Cressler left we set men to work excavating for the tank, and but a few days after we let a contract to F. A. Fisher & Co., of Minneapolis, for the full completion of the tank and building. The tank and building were crowded to completion as fast as men and money could build it. The tank and building were completed ready for the
78 plaintiff's workmen before the 1st of August, 1880, fully, so that the plaintiff's workmen could go on with their work uninterruptedly, and it was fully completed and locked up before the 15th of September. The tank and building were all ready by September 1, 1880. The first material for the holder reached Minneapolis not far from the middle of November. The first car-load of material for the holder arrived at Minneapolis on the 15th day of November, 1880.

On the arrival, or soon after the arrival, of the car-load of iron two men appeared to go to work. They worked a few days—I should say a couple of weeks. Then one of them left and went to Fort Wayne. The other one said he couldn't work alone, and quit work entirely. The work then lay abandoned, I should say, for two or three weeks. Then three men appeared on the ground and gathered up the one who was lying around, and four of them went to work; that the work dragged along in spite of my protesting and urging, and no other skilled labor was put upon the job during its construction. These men that were there employed about as many more

day laborers, making a force of about eight men in all. The men were delayed for want of material, and the force was accordingly lessened from time to time, owing to such delays, and this state of affairs continued until they called the work completed. The holder was not constructed of the kind of material called for in the specifications. The specifications called for annealed iron. There isn't a pound of annealed iron in the holder except the rivets. It is common iron. Annealed iron, as demanded by the specification, is a finer grade of iron, that is softened and toughened by an annealing process, and commands from one-half to three-fourths of a cent per pound more than common iron in the markets of the world.

The material used by the plaintiff in constructing the holder (under plaintiff's objection) was not as good, durable, or suitable for the holder as annealed iron would have been. The holder contains about 100,000 rivets, which are driven cold. They should upset in driving, so as to fill the holes punched in the sheet full. In
79 common iron frequently the holes will burst out to the edge of the sheet and tear between the rivets, causing innumerable leaks throughout the holder, which was the case with this holder; but with annealed iron the iron is softened and refined, so that the crowding of the rivets will stretch it, and it will not tear and burst out.

The holder was not constructed in the manner called for by the specifications; it was full of buckles and uneven places. I was absent from Minneapolis from January 19th until April 8th, 1881. I saw the holder on my return, and have seen it almost daily since that time up to the first of November, 1882. The holder was not round and true; it was full of buckles and uneven places. The holder has never worked smoothly, and has never rode level within six to eight inches.

When I returned to Minneapolis in April, 1881 (under plaintiff's objection), I found the holder in a very bad shape, scarcely fit to be used. It was binding and catching on its way up and down to such an extent that it caused greatly increased pressure, and was liable to wreck the holder entirely. The wheels on the wall-plates and the wheels on the friction-plates were in many instances and are now bearing only on one edge of the plates. Some of the guide-wheels on the vertical columns bind and crowd hard; others do not touch the columns within four or five inches. The holder was leaking gas badly in the crown and sides. The counter-balances and chains were catching onto the braces to such an extent that it had broken the chains in several instances. I think there were from one to two hundred leaks in the holder.

To correct the several defects (under same objection) I have spoken of, we first stopped the leakage as far as we could. It was impossible to correct the working of the holder without letting it down, removing the water from the tank, throwing it out of use, and giving it a general overhauling, which was not practicable, as we had no holder to take its place.

The holder has never been gas tight. The holder, as constructed by the plaintiff (under plaintiff's objection), was of very much

80 less value than it would have been had it been constructed of the material and in the manner specified in the contract.* I do not think it is worth $4,000.

In January, 1882, there was no foreman of either the retort or purifying house of the defendant, and never has been any such superintendent before or since.

We paid the plaintiff on account of this holder in cash $6,771.78, and delivered them coke of the value of $549.64 (under plaintiff's objection). We also charged the plaintiff (under same objection) for loss of profits on the sale of gas by reason of the non-completion of this holder from the 15th day of November, 1880, to the 19th day of February, 1881, the sum of $6,757.89.

Every pound of the coke about which I have testified (under same objection) was in fact delivered by the defendant to the plaintiff or its agents and used by them. The amount charged was the market value of coke, the same as it was sold to everybody at that time.

Question. State the manner by which you arrive at the loss of profits on the sale of gas, as you have testified.

Plaintiff objects upon the ground that the same is incompetent and immaterial.

Answer. We have at our general offices in the center of our distributing district a system of pressure-gauges which indicate the pressure upon our street mains at all times during the twenty-four hours of each day. The gas-holders we had in use at that time had a floating weight, giving us, when there was no draft upon our pipes, a uniform pressure of two inches water gauge, which was the greatest pressure we could put upon the town. During the active part of our nightly consumption the gauges in our general office, by reason of the draft on our pipes, would be reduced to a minimum pressure of about one inch, showing a loss by the consumption of an amount equal to what our pipes would carry under one inch pressure water gauge. The holder which the plaintiffs were to construct and have ready for use the 15th of November, 1880, by the terms of their specifications was to have a floating weight equal to four
81 inches pressure water gauge. This holder, if in action, would have given us, and did give us, when in action, a minimum pressure during the height of consumption of two and a half inches pressure water gauge in the center of our district—that is to say, at our general offices, on the same gauges on which the previous observations were made. This was unmistakable proof of the loss of the flow of gas equal to what our pipes would have carried had the plaintiff's holder been in use. We, therefore, took the aggregate of our monthly consumption as a basis to partially prove this assertion. We, however, base this estimate upon the well-established rule of the loss of flow of æriform fluids by reason of friction through given sized pipes, a given or established distance, which rule, in gas engineering, is as well established as any other mathematical calculation in any other system of engineering. Our books

*I would not give anything for another like it

and accounts are so kept that each month the cost and expense of the manufacture and distribution of gas for each month is kept separate, and we know to a mill every month what it costs us per thousand cubic feet to manufacture and distribute gas, and the losses before enumerated are the accurate and exact losses sustained by reason of our not being able to furnish gas to satisfy our customers, by reason of having to distribute under such diminished pressure.

I am familiar with all, or nearly all, the gas-works of the country, and I do not know of but one which distributes gas to its customers at a less than a two and a half inches water gauge minimum pressure. The several items I have given are the exact profits we would have made, had we had the holder, after deducting cost of manufacture and distribution.

Cross-examination:

Mr. Cressler came to Minneapolis in May, 1880, to get the contract for constructing the holder. None of the persons present at the gas-works took any part in the negotiations between Mr. Cressler and myself; they were simply there attending to their usual routine duties. I had had the specifications in my possession at the office two or three weeks before Mr. Cressler arrrived. Prior to Mr. Cressler's visit it had been understood between Mr. Murray and myself that he was to give us the ben-
82 efit of the fluctuation in iron which might occur in our favor. Mr. Cressler did not object to carrying out that prior arrangement, but, on the contrary, affirmed his willingness to carry out all of Mr. Murray's agreements. That fluctuation in our favor was to be determined on the day we gave the order for the purchase of the iron. That was one of the objects of Mr. Cressler's visit, to agree upon the time that they could have for the completion of the holder after we ordered them to buy the iron and go on with the work. At the time Mr. Cressler was there I had not made a contract for the construction of the tank and the buildings. I do not think building material at that time was unusually high.

The scaffolding which was used in the construction of the gas-works was left in our possession when the holder was completed. I think the tank was fully completed about the first of September or a little before. We received from the plaintiff early in July two drip-boxes and the inlet and outlet pipes for the tanks. These articles were included in the contract price for the holder and are properly known as tank castings. The man who left the work on the holder and went back to Fort Wayne, as I have testified, was named Waltermuth. He gave as his reason for leaving that he was three or four months behind in his pay and, as pay-day was approaching, he wanted to get down there and get his money. All the holes that could properly be punched in the sheets before the material arrived at Minneapolis were so punched. Those holes were of the size necessary to admit the rivets which were used. When it becomes necessary to repair any gas-holder the gas has to be exhausted and the water removed from the tank, providing such

repairs necessitate the going on the inside of the holder. During the time the coke was furnished to the plaintiff it was worth $8.00 per ton or fifty cents a barrel. The holder which was constructed by the plaintiff has been constantly in use by us since its completion, in February, 1881, for the reason we have nothing else to take its place. We had two holders in use prior to the construction of the one now in suit. We have no other holder now in process of construction and have not had since February, 1881.

83 The increase in gas consumption during the years 1881 and 1882 in Minneapolis has been from seventy to eighty per cent. Defendant has supplied this increase. From the 15th of November, 1880, to the present time we have never declined to supply gas to any person wishing it within reach of our pipes. During this time there has been no other gas manufactory in Minneapolis. I cannot state here what the average profit per thousand cubic feet on the manufacture of gas by the defendant was during the months of November and December, 1880, and January and February, 1881, as I have not the figures here before me. I cannot state, even approximately, what the percentage of profits are. My best judgment is that it is $2.00 on $3.50 per thousand feet; in other words, the gas costs us about $1.50 per thousand feet. I do not know whether the capital stock of the defendant has depreciated since the first day of November, 1880, to the present time. I do know that there has not been any stock bought or sold within the last six years. I am a stockholder in the defendant's company. My family own one-half of the stock. The stock of the company is $800,000.00. The coke which was furnished to the plaintiff was manufactured by the defendant and on the ground at the gas-works. The two holders which were in use prior to the completion of this one have not been in use at any time since this holder was completed.

Redirect examination:

One of the two old holders was demolished to make room for a new building and the other is idle. It is idle because if it was full it would not hold a half hour's supply of gas for the town. When Mr. Cressler was at Minneapolis in May, 1880, I did not tell him that the defendant had plenty of coke, or would furnish coke to keep the men warm the following winter, and never told him anything of that kind at any time.

FREEMAN A. FISHER:

84 I have resided in Minneapolis for the past four years. I built the tank and tank building for the defendant described in the contract between defendant and myself, dated July 3d, 1880. I completed the tank before the middle of September, 1880. I completed the tank building by the first day of November, 1880, except some slate on the roof. I put the bolts in the wall to hold the tank-guides. I did not put up the tank-guides, and do not think they were put up until after the building was completed. Contract put in evidence, and marked Exhibit 1.

Cross-examined:

I began work on the tank soon after the contract was made; my work was not in any manner delayed by reason of the tank connections. The tank was completed by the 28th of August, 1880, and the building was completed up to the second story by the 15th of September, 1880. Negotiations were pending between the defendant and myself for the construction of the tank and building from one to two months before the contract was made. The contract was signed on the day it was dated, or within a day or two after. I do not know that brick were usually high in the spring prior to the making of this contract; brick are usually a little higher here in the winter and spring than at any other season of the year. The reason why the building was not completed at the time called for in the contract was because we were in no hurry to complete it until the iron work was in. I do not remember that we were urged at all by the defendant to complete the building at the time called for in the contract. The bolts for the guide-plates were ready and caused no delay.

Redirect examination:

When the building was up to the second story, on the 15th day of September, 1880, as I have testified, the men of the plaintiff could have gone to work putting in the iron work of the holder if I had put in the floor as called for by the contract. The excavation for the tank had been made by the defendant when I commenced work upon the tank. The defendant urged me to complete the
85 tank at the time called for in the contract, so as to be ready for the workmen of the plaintiff.

Recross-examination:

We hung a rough door on the building some time in September, and some time in the spring of 1881 we hung the door that belonged there. I do not remember whether we commenced the building until after the tank was finished or not. The building sits on the outside edge of the tank. The rough door was hung to the door-frame, and it had a lock. There is but one door to the building. I was ready and willing to put in the floor, as called for in the contract, at any time when called upon by the defendant.

WILLIAM W. RAND:

I have been foreman of the defendant for the past six or seven years, and have charge of the retort and purifying house and other works of the defendant.

I heard a conversation between H. W. Brown and A. D. Cressler about the 28th day of May, 1880, respecting the construction of the gas-holder by the plaintiff for the defendant. This conversation was had in the condensing room at the works of the defendant in this city. They were talking about building the holder, and Mr. Cressler said the holder was to be completed within four months after the iron was contracted for—that is to say, the holder was to be

ready for gas four months after the iron was contracted for. There has not been any superintendent of the retort or purifying house except myself since my employment. I was present when gas was first put into the holder, in February, 1881. The holder at that time did not work smoothly; it did not ride evenly. I have seen it every day since; it has not worked smoothly since that time; it is not plumb, and never has been; it tips six or eight inches. When gas was first turned in it tipped the same as it does now. The holder was not gas-tight when gas was first turned in, and never has been. There was 1,000 leaks when the holder was full. From the beginning I tried to stop the leaks. I stopped them with a com-
86 pound of red lead and putty. I have been required to stop these leaks every day. I stopped the last one this morning. (Under plaintiff's objection.)

I have recently counted the number of leaks in one-half of the outer section of this holder, and found two hundred and fourteen leaks.

(Under plaintiff's objection.)

When the gas was first turned into the holder the leaks were in the crown sheet around the man-hole; also where the wheels are connected to the guide-rails; also on the sides of the holder where the pulleys connect with the outer section; it also leaked around the rivets, both on the inner and outer sections. Ever since the holder was constructed the leaks have been in about the same places. You could not detect these leaks from the floor by the smell of the gas escaping. Mr. Dickey, the plaintiff's foreman, was here when gas was first turned into the holder; when he left here the holder was leaking. I was present, in the employ of the defendant, during the construction of the tank and building. The tank was completed about the first of August, *or* as near as I can remember. When the plaintiff's men came to work on the holder the tank was all completed, and the building was completed except some slate on the roof.

Q. State whether or not, in the conversation about which you have testified between Mr. Brown and Mr. Cressler, anything was said as to whether Mr. Cressler would have the iron here in Minneapolis within sixty days after being ordered by Mr. Brown to go ahead.

(Objected to by plaintiff as leading and incompetent.)

A. Yes; I remember the conversation; at that time there was a difference in the price of iron,— being pretty high at that time, and Mr. Cressler said that he would have the iron on the ground within sixty days after Mr. Brown ordered him to buy.

When the holder was first completed the tank-wheels did not ride squarely upon the tank-guides; it is just the same to-day, and has been ever since that time. I do not know a man by the
87 name of Remmert. All the eight counter-weights are on the holder except one. One night the weight, in lowering, caught an arm that holds the rail and broke it, and the chain and weight fell (the last above under plaintiff's objection). I never told Mr. Remmert or any one else that I took that weight off for the pur-

pose of making that holder ride even. I never told Mr. Remmert that the holder was right in every respect, or that we had had no trouble with the holder from the time the gas was first turned into it, or that the holder was a good job, with the exception of a few leaks on the top of the crown. I showed Mr. Coverdale the holder last December. I did not tell him that the holder was heavier on one side than the other, and that I had to take the weight off, or that the holder worked well then. When we first went into the holder building Mr. Coverdale asked me if the tank leaked. I told him that it did, but we had stopped it now, and that it held water all right. I showed him the buckles in the holder, and also pointed out to him where there had been some leaks. I did not tell him that Mr. Dickey was one of the best workmen in his line of business that I had ever seen, or that the holder leaked a little at first, or that I believed the iron in this holder was all right.

At the time Mr. Coverdale was in the building the iron shutters were on the building, and it was dark two-thirds of the way round.

Cross-examination:

The conversation between Mr. Brown and Mr. Cressler, about which I have testified, took place some time in May. I was in the condensing room when it occurred. No one called upon me to take part in the conversation. I stood near by and heard it. I did not take any part in making the contract. I did not know whether Mr. Brown and Mr. Cressler had any talk about the contract before they came into the condensing room or not. The contract was concluded between them before they left the condensing room. Mr. Cressler spoke first when they came into the condensing room. I heard all the conversation that took place between Mr. Brown and Mr. Cressler in the condensing room. Mr. Cressler agreed to have the
88 holder completed—ready for gas—four months after Mr. Brown ordered the iron of Mr. Cressler for the works.

Q. What did Mr. Brown say to that? Give the language used.

A. I do not remember the conversation. Mr. Brown seemed pleased if he would have the holder completed four months after the iron was ordered.

Q. What was next said by either Cressler or Brown?

A. I don't know any further conversation than that.

Mr. Brown and Mr. Cressler were in the condensing room about fifteen or twenty minutes, I should judge; I do not remember that any other persons were present during the conversation. The defendant had twelve or thirteen men employed about the gas-works during the winter of 1880 and 1881, and about twenty during the winter of 1882 and 1883; all of them were paid the same, and were of the same grade of workmen, there being no one over them except myself. Gas was first put into the holder about a week after it was completed; there was no gas put into it before that time. The riding of the holder on the wheels up and down the guide-rails is not a matter of adjustment by the weights. The weights are put on for pressure; they do not interfere a particle with the riding of the holder. The defendant had two holders in use prior to the making

of this one. After the gas was put in this holder the other two holders were not used. One of the old holders has been torn down; the other is still standing, but has not been used since. Defendant has not used any other holder since gas was first put into the holder in question to the present time. The consumption (under defendant's objection) of gas used in Minneapolis since February, 1881, has increased; it has about doubled. The tank connections were at the gas-works early in July. We have not painted the holder since it was constructed. There are about 18 or 20 windows in the holder building. When Mr. Coverdale and I examined the holder the windows were all closed; it was cold weather.

Re-examination:

I have nothing to do with the books of the defendant.
89 When I state that the increase in the consumption of gas has about doubled since February, 1881, it is mere guess-work. The defendant put in the tank connections in July, 1880. At that time there had been no men here at work for the plaintiff.

Recross-examination:

I have charge of the manufacturing of gas at the works. My judgment of the increased consumption of gas is based upon the increase of the amount manufactured. When Mr. Coverdale came to see me he introduced himself.

ALONZO C. RAND:

I have been president of the defendant for the past six years. I have been engaged in manufacturing gas since 1866. I have had an extensive experience in the construction of gas-works. I know the holder in question. I am acquainted with Mr. Cressler, the general manager of plaintiff. I first met him May 28, 1880, at my house in Minneapolis. We commenced excavating for the tank within a week after Mr. Cressler was here. I think the tank was completed about the last of August or the first of September. The walls of the building were up about the first of September. I assisted in building several large gas-holders in New York city. I was there as an expert. Our tank and building were ready about the middle of July or first of August, 1880, so that the workmen of the plaintiff could begin work. Ninety per cent. of the gas-holders of the country do not have buildings over them.

The tank only (under plaintiff's objection), together with the inlet and outlet pipes, was necessary to be finished before the plaintiff could commence work on the holder. Defendant put in the inlet and outlet pipes for the reason that plaintiff had no men here to do it. The first material for the holder, except the pipes, arrived here about November 10th or 15th.

The plaintiff had from seven to ten men at work on the holder. Forty men (under plaintiff's objection) could, in my judgment, have worked upon the holder.

90 The arrival of material occasioned numerous delays, and there were occasions when the men stopped work for the want

of material; and this state of affairs continued throughout the construction of the holder. The holder was not constructed of the kind of material called for in the specifications. The iron was not annealed, whereas the specifications called for annealed iron. I do not think there is any annealed iron in the holder. I judge so from the leaks in the holder. I have had a very extensive experience in the working of iron. I have served part of my life as a blacksmith. I have had experience in working sheet-iron for twenty years. The iron in the holder that I have examined is common iron. Annealed iron is made soft through an annealing process, which consists in subjecting the iron to a low red heat and cooling it gradually. The iron is thus made soft and tough. Annealed iron is worth about ½ a cent per pound more than common iron. The material used by the plaintiff in the construction of this holder was not as good, suitable, or durable for the holder as annealed iron would have been. It was not as good because the rivets would not impact the surfaces of iron as well when unannealed as when annealed. The joint is imperfect where the surfaces of the iron are hard, as it springs back while riveting. The holes are punched smaller than the rivets, and the rivets are slightly tapered to drive tight, and were so in this holder; so that if the iron was annealed the holes would not burst out. I saw many of the rivet holes in this holder that had burst out. The bursting out of these rivet holes makes the holder leak, and necessitates the use of red lead and putty to stop the leaks. I examined some of the sheets that were left over after the holder was completed, and those sheets were not of annealed iron. The examination I made was by bending the sheets, and they would break, which would not have been the case had the iron been annealed. The holder was not constructed in the manner called for by the specifications. The sides were not constructed on parallel lines; that changes the seal in the cup. This holder is six or eight inches out of line. The cup is sixteen inches deep, to hold a column of water sixteen inches high. The difference in the altitude
91 of the water in the cup on opposite sides is six to seven inches, showing the holder does not ride evenly. I left the city in January, 1881, and did not return until the following April. Soon after my return I saw the holder; it was not round and true; many of the sheets were buckled; the effect of these buckles is to make an unequal strain upon the rivets. The holder did not work smoothly, and I never saw it when it did. The holder does not ride level; it tips six inches in its diameter from a level, as shown by its cup. When I returned in April I found the holder in a leaking condition, although hundreds of places seemed to be stopped with putty and red lead. It was working hard—binding and creaking—and still works the same. I have had the counter-balances shifted in different places, but, the sides not being parallel, it cannot be remedied. The side wheels and guide-wheels have been adjusted various ways without giving permanent relief. I have examined and plumbed the vertical columns and found them true and perpendicular. The wheels do not run true on these columns. Some of them do not touch the columns; the effect of this is to cause more or less friction

in the rising and lowering of the holder. When I first saw the holder, in April, 1881, it was leaking in the side sheets. I did not examine the crown. The holder as constructed by the plaintiff was of much less value than it would have been had it been constructed of the material and in the manner specified in the contract. I do not think the holder as constructed is of more than half the value it would have been if constructed as called for by the contract. In January, 1882, there was no foreman of either the retort or purifying house of the defendant and never has been. The market value of coke during the construction of the holder was $8 per ton. Respecting the coke that was used at the Sixth-street station and under the benches, amounting to $226.14, I wish to say that, by reason of the plaintiff not completing the holder by the 15th of November, 1880, as by its contract it agreed to do, we were compelled to keep extra benches of retorts running in order to keep gas on the town during the hours of greatest consumption. We were compelled to
92 use coke at the Sixth-street station to keep the water in the tank from freezing, which we would not have been compelled to do had the holder been completed according to contract.

Between the 15th day of November, 1880, and the 19th day of February, 1881 (under plaintiff's objection), the defendant lost profits on the manufacture and sale of gas, by reason of the holder in question not being completed, amounting to $6,757.89. I made the estimate of this loss, and made the entries in the books and charged them up to the plaintiff. I arrived at the loss of such profits in the following manner:

By having lost twenty-tenths pressure in supplying gas to our customers, the public demanded more gas than we could supply. Our pressure-gauge at our office, which is about in the center of our gas-consuming district, was less than one inch. The gas not having passed through a meter before it reached the pressure-gauge, and three-tenths of an inch being the usual pressure required to run the meter, the gauge would have exhibited, if the gas supplied it had just passed through a meter, less than seven-tenths of one inch. The pressure required for a full or adequate flow of gas in the center of our district should be twenty-five (25) tenths. Therefore there was a loss of pressure in the center of consumption of more than fifteen (15) tenths. The estimate referred to is based upon the authority of Professor King, publisher of the standard and accepted work on the sale and distribution of gas in the world. The holder contracted for was to have furnished a pressure at the works of forty-five (45) tenths. The older and smaller holders, that were to be displaced by the larger one, furnished a pressure of twenty-five (25) tenths at the works. Now, taking the quantity of gas actually sold during the period mentioned and what would have been sold had we had adequate pressure would have made up in profits the amount charged in the statement. This estimate that I have made was an actual loss, and does not include the loss of customers by reason of inadequate pressure. Our customers to-day, with a pressure at the works of forty-five (45) tenths, do not have any more

93 burner pressure during the hours of greatest consumption of gas, and in the heart of the district, than is needed for the perfect combustion of the gas and to satisfy them. During the height of consumption, when the pressure is forty-five (45) tenths at the works, the pressure at our office would be about twenty tenths. When the gauge at the office indicates twenty-tenths pressure, the burner pressure, when the gas is consumed, would not be over ten-tenths by reason of the pressure required to run the meter, and the friction of the gas in passing through the small house pipes. I am familiar with most of the gas-works of the country and have been for many years, and have visited the more prominent works in the United States for the past fifteen years; the pressure carried at those works will range from forty to sixty tenths. It varies according to the location of the works. The specific gravity of the gas being about half the weight of air, it possesses greater ascension powers, and when the works are located in a place lower than where the gas is consumed, a proportionately less pressure is required at the gas-holder. The market value of gas during the years 1880 and 1881 was four dollars ($4.00) per thousand cubic feet gross. If bills were paid within ten (10) days after the first of the month, a rebate of fifty cents per thousand feet was made, making three dollars and fifty cents ($3.50) net per thousand feet; this was the uniform standard price for gas in this city at that time and had been so for two years prior.

I met Mr. Cressler the second time at the mayor's office in Minneapolis, in February, 1882, and had a conversation with him about the construction of this holder. He said he thought we were charging them too much damages for the non-fulfillment of their contract, and said that he had engaged to perform more work than he could complete, having been disappointed in both men and material, and wished me to have Mr. Brown meet him in St. Louis, on Mr. Brown's return from the Hot Springs, to effect a compromise and settle up our differences. I told him that any settlement that might be effected between himself and Mr. Brown would be agreeable to me, and that I would so write Mr. Brown, and that the charges

94 made against the plaintiff by the defendant were reasonable and just, and, in my opinion, did not make up the loss suffered by the defendant by reason of the plaintiff's non-fulfillment of its contract. I said you knew, Mr. Cressler, the exigencies of the case fully when you undertook the job; the situation was explained perfectly to you before you engaged in the contract, and yet I fully sympathize with you and, of course, have greater reason to regret your failure to complete the work according to the terms of the agreement than you have. He expressed great sorrow at not having completed the work on the 15th of November, as agreed, and acknowledged, during the conversation, a number of times, that he agreed to have the holder completed by the 15th of November, 1880, and wished me to use all my influence to assist him in compromising with Mr. Brown, in St. Louis. He stated it was the first telescopic holder he attempted to build

(All the last above testimony as to profits and the conversation in 1882 under plaintiff's objection.)

The consumption of gas in this city, during the winter months, is very much greater than at other seasons of the year; we therefore had more use for a holder in the winter then at other seasons of the year.

Cross-examination:

I did not take any part in making the contract for the holder and knew nothing about it except what Mr. Brown told me. The walls of the building enclosing the holder are of brick, and those walls are on the top of the tank. Mr. Brown had charge of the construction of the holder on the part of the defendant. I had nothing to do with it personally. My judgment, that the holder was not made of annealed iron, was based upon my opinion that a holder made of annealed iron would not exhibit so many leaks. There was nothing in the exterior appearance of the holder to indicate that it was made of unannealed iron except a patch on one side of the holder where the sheet was torn and had been repaired. In my opinion a sheet of annealed iron will not be torn in the ordinary process of constructing a gas-holder, but it is possible to tear it; a sheet of annealed iron may be broken if bent back and forth a sufficient number of times. I was not in Minne-
95 apolis during the last five or six weeks that the holder was being constructed. If the leaks in the holder were below the height of a person standing on the curb they might be detected by the odor, but if above him, and the building well ventilated, the odor would be carried out before diffusion of the gas ensued. We kept the new building, when completed, warmed during the winter months to keep the water in the tank from freezing, the same as we did our old one. Since the holder in question was completed it has been in constant use by the defendant.

Prior to the construction of this holder we had two holders in use. We have used neither of them since this holder was completed. One of the old holders has been torn down and the other one abandoned. The increase of gas consumption in Minneapolis since February, 1881, has been about eighty per cent. Defendant has supplied this increase of consumption. There is no other manufacturer of gas within or supplying the city of Minneapolis with gas. During the months of November and December, 1880, and January and February, 1881, the average profit made by the defendant per thousand cubic feet on the manufacture and sale of gas was over $2.

When Mr. Cressler called upon me in February, 1882, it was with a view to compromising our differences, and the conversation was to that end.

Re-examination:

The reason why the defendant has used the holder in question since it was completed is because it had no other holder to use. The old holder that is not destroyed is so small that it would not

hold gas enough to run the town for twenty minutes during the height of consumption.

When Mr. Cressler came to my office in February, 1882, he stated that the object of his coming was to effect a compromise, and said he expected to find Mr. Brown here. I did not talk compromise with him except as I have stated. No proposition of settlement was made by either of us. I referred him to Mr. Brown, and told him anything Mr. Brown said or did I would agree to. Under
96 the charter of the defendant the defendant is obliged to supply gas to all persons demanding the same on the line of our gas-mains wherever and whenever required. During the construction of this holder the defendant supplied a *pro rata* amount of gas to all persons demanding the same upon the line of our mains, but we were not able to supply all the gas demanded.

Recross-examination:

Since February, 1881, we have not had any new gas-holder under construction. The capacity of the gas-holder in question is three times as great as that of the two old holders.

JOHN H. STROTHMAN:

I have lived in Minneapolis for the past twelve years. My occupation is that of an iron-worker and general machinist, and has been for nearly twenty years. I examined the gas-holder in question yesterday. The windows of the building were all open. There were two fresh leaks in the sides of the holder. (The above testimony under plaintiff's objection.) The holder was not plumb. I examined it with my rule, and, as near as I could measure it, it was about 5 and ¾ inches out of plumb. (Under plaintiff's objection.) I am familiar with the quality of iron called annealed iron. I examined a sheet of iron (under plaintiff's objection) said to be a portion of the iron sent by the plaintiff for the construction of the holder, and said to be the same as that contained in the holder; and, in my opinion, that sheet was not annealed iron. I did not examine that sheet with the iron in the holder for the purpose of ascertaining whether it was of the same material as that contained in the holder. I tried the toughness of the sheet about which I have testified. I took a piece off of this sheet and put it in a vise, and took a wrench and turned it back and forth twice, and it broke in two. Annealed iron would not have broken by that test. This sheet that I examined was painted the same color as the holder, and had rivet holes punched in one side and in one end.

Cross-examination:

I learned my trade at the Bay State Iron Works, in Mil-
97 waukee, about twenty years ago. I am a partner in the Standard Iron Works in this city. We do repairing work for the defendant's company. My attention had never been called to the iron in this holder before the sheet was brought to me yesterday. The examination of this sheet was made at my shop. I do not know where that iron came from or what it was, except what

was told me. I never made any annealed iron, and do not know how iron is annealed. I was in the holder building yesterday; when examining the holder about forty-five minutes we discovered two leaks. To ascertain whether the holder was plumb I measured from the top of the holder with my pocket rule to the surface of the water on two sides. Annealed iron can be broken by bending it back and forth, but, in my judgment, annealed iron requires more bending to break it than I gave this piece.

Re-examination:

In my judgment, the piece of iron I examined was common sheet-iron.

ALONZO T. RAND:

I am a gas engineer; have resided in Minneapolis for the past nine years, and have been superintendent of the defendant for the past two years. During the construction of the holder in question I was secretary of the defendant. The stoves referred to in the account in evidence and in the deposition of Mr. Cressler were purchased by a foreman of the plaintiff, and were paid for by the defendant at the request of the foreman. The stoves were used by the workmen of the plaintiff during the construction of the holder for the purpose of heating the building. The stoves were composed of sheet-iron and cast-iron. Coke was used in them during the time they were used. The stoves were in a bad condition when the plaintiff was through using them, being burnt out. I do not think the stoves were of any value when the plaintiff's men were through with them. The defendant has never used them nor made any claim for them. I cannot say where they are now, but the defendant has never done anything with them. I was in the city during all of the time of the construction of the holder; during
98 the forepart of it I saw it occasionally. During the latter part of its construction I saw it every day. I was present when gas was first turned into it. As soon as the plaintiff's foreman called the work completed we turned gas into it. Mr. Dickey, plaintiff's foreman, was here at that time and remained several days after. When we first turned gas into the holder it leaked; it leaked all over the sides, and on the top, and around the pulleys. Mr. Dickey was present and assisted in trying to stop the leaks. Ever since that time the holder has continued to leak. At the time gas was first turned into the holder it did not ride smoothly. It was out of plumb, and tipped about five and one-half inches. The holder has not been materially different in respect to being out of plumb from the time we first began to use it to the present time. There are eight counter-balances on the holder. When we had used it about two months one of these counter-balances caught on a cast-iron bracket and broke off and fell to the ground, and three or four hundred pounds of iron fell into the tank, and it also broke two castings that held the guide-rails. (The last above under plaintiff's objection.) This same counter-balance has fallen two or three times since, and we finally took it off permanently about a year ago

this spring. It seemed to make no difference in the working of the holder, whether it was on or off. I sent a piece or sheet of iron to Mr. Strothman yesterday to have it examined by him. This sheet was one of the pieces that was left by the plaintiff standing against the holder building after the holder was completed. The sheet was of the same thickness as that used in the construction of the holder, was painted and punched the same, and was of the same size as the side sheets, and came with the other material for the holder. Since the construction of the holder that sheet has been lying on the ground near the holder building. I am acquainted with A. D. Cressler, general manager of the plaintiff. I saw him in this city in February, 1882, and had a conversation with him respecting the construction of this holder in the holder building. I said to him: Mr. Cressler, you know this holder is not right, is not perfect. He said: I know it is not right. He said: I will make it right.
99 I pointed out the leaks to him before this conversation. I also showed him how the holder was out of plumb; also how the guide-wheels did not run on the track. I pointed out the defects in general of the holder, including the buckled sides and the buckled guide or friction plates. All these things were pointed out before the conversation was had about which I have testified. (All above testimony as to conversation under plaintiff's objection.)

Cross-examination:

My understanding about Mr. Cressler's visit here in February, 1882, was that he came here with a view of compromising our differences, although he never said anything to me about it. I never had charge of the construction of the holder. Up to about the middle of January, 1881, I saw the holder about once a week; from that time until it was completed I saw it every day. When the counter-balance I have before referred to was finally left off it fell of its own accord, and we concluded not to hang it up again. The sheets that went into the holder had rivet holes on all their sides. The sheet of iron which I sent to Mr. Strothman had been lying unprotected from the weather since the completion of the holder. In the year 1881 we manufactured and sold about 35,000,000 feet of gas and in the year 1882 about 45,000,000 feet. Since the completion of the holder in question we have had no other holder in use. The sheet of iron that was sent to Mr. Strothman had rivet holes punched on the end and side; it was only half a sheet; it was cut in two lengthwise with a chisel. I was not present when any of the material for the holder arrived on the ground. The piece of iron I sent to Mr. Strothman was 12 or 14 inches wide and about 5 or 6 feet long.

Re-examination:

When Mr. Cressler came here, in February, 1882, he told me he came to see the holder, but did not say anything about having come to effect a compromise. The piece of iron I sent to Mr. Strothman was one-quarter of a sheet; the original sheet from which this piece was taken had holes all around the outer edge.

100 HARVEY W. BROWN recalled:

Mr. Waltermuth, the foreman of the plaintiff that was first here, purchased the stoves of a second-hand dealer in this city. The stoves were used for the purpose of heating the holder building so that the plaintiff's men could work in it. Waltermuth came to me and got the money and paid for the stoves, and we charged the plaintiff for them, as shown by the account in evidence. The stoves were second-hand and in bad condition when they were purchased, and when they were through with them they were badly wrecked. They were, in my judgment, but of very little value. The defendant has never used them or made any claim to them. There are there, subject to the plaintiff's order. The method by which I arrived at the conclusion (under plaintiff's objection) that we would have sold the amount of gas, as stated in my former deposition, between November 15th, 1880, and February 19th, 1881, if the holder had been completed at the time specified in the contract, is as follows:

The gas burners and fixtures used by the gas consumers in this city are adjusted to burn gas to the greatest advantage to the consumer under a pressure of two and one-half inches. To accomplish this in some sections of the city burners are checked down to that point. The weight of our old holders at the works gave a pressure of two and one-half inches, out of the burning hours, at our general offices on Nicollet avenue; their weight, however, was only two inches. The increase of a half inch, as between the holder and our office on Nicollet avenue, is due to the fact that our office on Nicollet avenue is located on ground some thirty-three feet higher than the holder at the works, and the increase is attributed to the buoyancy of the gas by reason of this difference in the altitude. Now, when those old holders were in action, during the hours of consumption the draw upon us was such as to reduce the pressure down to one inch pressure at our office on Nicollet avenue, or at the point of burning, minus the friction of the meter. In this result no burner lighted in our district was supplied with sufficient gas, not by one-half, necessary to use the same under proper pressure. Had we taken on one thousand or more new con-
101 sumers the aggregate amount of gas sent out from the works would not have been increased, but the additional consumers would simply have drawn what they used away from the burners of other consumers, for the reason that our distributing mains were carrying gas to their fullest capacity under the pressure we were able to put upon them from the old holders. Now, as our agreement for our new holder called for a maximum pressure of four inches, had we been able to put the four inches on the distributing mains at the works, we, of course, under such circumstances, would have been enabled to have conveyed to our different consumers the quantity of gas they were entitled to receive and were constantly clamoring for to have lighted them up under proper conditions and under proper pressure. It therefore became just a question of mathematical calculation, knowing our low pressure, to calculate the loss of

sale of gas as before estimated. During the construction of the holder (under plaintiff's objection) I had a conversation at the holder building with Mr. Dickey, the foreman of the plaintiff, in respect to the quality of iron out of which the holder was constructed. This conversation occurred about the holidays of 1880 and 1881. I was complaining to Mr. Dickey about the character of the men employed as riveters, he having at work about a dozen men who were common street laborers and were not mechanics of any kind. There were a great many rivet holes bursted out. Mr. Dickey said it could not be helped, as the iron was so hard and rotten that they could not drive their drifts without bursting the iron. I said to him, Our contract called for best annealed iron. He replied that he did not know what the contract called for, but there was not a pound of annealed iron on the ground outside the rivets.

Cross-examination:

Mr. Dickey at that time was in a row with the plaintiff. From Nov. 1st, 1880, up to the time of the completion of this holder, no changes were made in our distributing mains.

OTIS A. PRAY:

I have resided in Minneapolis for the past twenty-five
102 years. My occupation is manufacturing mill machinery and working in iron. I have been a manufacturer of iron and machinery for the past fifteen years. I examined the gas-holder of the defendant June 2d, 1883. The mechanical construction of the holder (under plaintiff's objection) I should consider a poor job and very unsatisfactory if it had been done for myself. I examined a sheet of iron said to be of the same quality of iron as the holder. I should say that the piece of iron that I examined was not annealed iron. I tested it by bending and breaking it while it was cold, and also after heating it. In my judgment, it was a very poor quality of iron—common iron. I also annealed it. It was somewhat tougher after annealing. My process of annealing was by heating it in a common forge and burying it in a composition. This is not the ordinary way of annealing iron in large quantities.

Cross-examination:

I never manufactured any gas machinery except pipes for retorts. I examined the holder between two and three o'clock p. m. I should judge about twenty feet of the holder was out of water at the time, but I did not measure it. I was in the holder-house about forty or fifty minutes. I did not go up on top of the holder. I did nothing more than to walk around and look at it. I do not know, of my own knowledge, that the sheet of iron I examined was the same iron that the holder is constructed of. The piece of iron that I examined was about eighteen inches long by eight inches wide. I made the test and annealed the iron personally.

To anneal the iron I buried it in lime. The ordinary way to anneal iron in large quantities is to put it into furnaces and heat it; then cool it by degrees. I never have closely examined any gas-

holder other than this. I am not familiar with the process of manufacturing gas and the machinery necessary to it.

Re-examination:

Judging from the general appearance of the sheet-iron work it was not properly riveted and not properly punched. The
103 holder plates were riveted on in such a shape that they were very crooked, and consequently (under plaintiff's objection) a bad job mechanically.

ALONZO C. RAND recalled:

I was present when Mr. Pray examined the piece of iron, as testified by him, and saw it.

This piece of iron came from the gas-works. It was brought there by the railroad company from the plaintiff, and is a portion of the iron shipped here by the plaintiff for the construction of defendant's holder. I took the piece of iron to Mr. Pray for the purpose of testing it, and was with him during all the time that he was testing it. I know this piece of iron was a portion of the iron shipped here by the plaintiff for the construction of the holder, because I took charge of this piece of iron after the holder was completed, and had it placed for safe keeping in our cellar. I had a tool-mark made upon it for the purpose of identification. The piece examined by Mr. Pray is a piece of the sheet examined by Mr. Strothman.

Cross-examination:

I was absent from Minneapolis from about the middle of January until the 1st week in April, 1881. The sheet of iron from which the piece in question was taken was little more than half a sheet, and was intended to complete one of the circles of the holder. I do not know whether the balance of the sheet went into the holder or not.

Re-examination:

I had the sheet about which I have testified put into the cellar soon after my return, in April, 1881, and it has been there ever since, until I took it out for Strothman's examination. I saw the sheets of iron out of which the holder was constructed, but did not examine them. The sheets in the holder appeared to be similar to this sheet in thickness and quality. This sheet was painted the same as the sheets out of which the holder was constructed.

(It is stipulated between the parties that the holder was built upon the land described in the bill of complaint, and that
104 the plaintiff filed the mechanics' lien at the time and in the manner alleged in the bill.)

In the specifications (being Exhibit No. 11 and attached to the deposition of Mr. Cressler), under the head of "sundries," is the following provision:

"All the sheets to be used in the holder must be of annealed iron and straightened, true, and level, and be perfectly free from buckles; all the material used to be the very best of their respective kinds,

and the workmanship must be first-class in every respect. The work must all be properly fitted in the shop before erection and receive for the sheet-iron one coat of (paint) oxide of iron paint and boiled linseed oil. When the work is finished it shall all have one coat of oxide of iron paint and boiled linseed oil. When the holder is completed it shall be round and true, work smoothly, and be perfectly gas-tight."

The contract between F. A. Fisher and the defendant for the construction of the tank and holder building bears date July 3, 1880, and attached to the deposition of Mr. Fisher, containing this provision:

"That in the case of the failure or unreasonable delay of said party of the second part to furnish and provide the necessary labor and material in the judgment of said superintendent (H. W. Brown), or his successor in office, to complete said structure within the time hereinafter stated the said party of the first part may, after three days' notice given in writing, provide other labor and material and prosecute said work to its proper completion and deduct the cost of such labor and material from the consideration of this agreement. And for the consideration aforesaid said party of the second part agrees to fully complete and finish said building on the 1st day of October, 1880, and that he will at least complete said building to the bottom of the windows on the second story thereof, as shown by said drawings, on or before the 15th of September, 1880, and that he will, if desired and requested by said party of the first part, when he shall have said building completed to the bottom of said windows on said second story as aforesaid, build and complete a floor across the whole of said structure so that work may be prosecuted underneath
105 the same without molestation or interference by the dropping of material or debris from above."

ALFRED D. CRESSLER, being called in rebuttal, testifies as follows:

All of the sheet-iron which went into the holder in suit was ordered by me of the Licking Rolling Mill Company of Cincinnati, Ohio, at the time I went to Cincinnati, in June, 1880. The sheets of annealed iron which were shipped to the plaintiff by the Licking Rolling Mill Company, as testified to by the witness Droege, were the same sheets which were forwarded to Minneapolis and went into the construction of the holder in suit.

I never told the witness Brown, either in the hearing of witness, W. W. Rand, or elsewhere, that the holder was to be completed within four months after the iron was contracted for, or that the holder was to be ready for gas four months after the iron was contracted for, or that I would have the iron on the ground within sixty days after Mr. Brown ordered me to buy.

I never stated to the witness, Alonzo C. Rand, that the plaintiff had not fulfilled its contract as to the construction of the holder, or that I had agreed to have the holder completed by November 15, 1880.

I never stated to the witness, Alonzo T. Rand, that the holder was not right; but I did state to him, in answer to some complaint

that he had made, and by way of compromise, that if it was not right and he would point out the defects and state a time when we could have workmen upon the holder, that I would make it right without expense to the defendant. This he did not do or accede to.

I have read the testimony of the witnesses Strothman and Pray. The tests applied by them to determine whether or not the iron was annealed, furnished no basis from which any person knowing how iron is annealed, and its character after it is annealed, would for a moment rest his judgment. Annealed iron will break if bent backward and forward, as I have no doubt this did.

Cross-examination:

106 The iron I ordered from the Licking Rolling Mill Company was shipped direct to Fort Wayne. It was not mingled with other gas-holder iron in the shops at that time. I purchased iron for other gas-holders during 1880; I purchased such other iron from the firm of Graff, Bennett & Co., of Pittsburgh, during June, July, and August, 1880. I know the sheets that were used in constructing the holder in suit were the same ones ordered from and delivered by the Licking Rolling Mill Co., because holders vary in size and construction, and the sheets are made especially for each holder, and the order is given at the time for the number and sizes of sheets required, and when received at our works the material for each holder is piled separately, and I know that this was done in this case.

When I was in Minneapolis, on May 28th, 1880, I did not examine the holders then in use by the defendant, and their capacity was not known to me.

ROBERT B. DICKEY, recalled for plaintiff in rebuttal, testifies as follows:

I never said to the witness Brown at the time of the construction of the holder, or at any time, that the iron was so hard and rotten that the drifts and rivets could not be driven without bursting the iron, or anything of the kind; nor did I ever say to said Brown at any time that there was not a pound of annealed iron on the ground outside of the rivets.

EXHIBIT 3.

FORT WAYNE, IND., *April 5th*, 1880.

H. W. Brown, sup't gas-works, Minneapolis, Minn.

DEAR SIR: I expected to have been in Minneapolis some time ago, but I had a job in Toledo that I could not leave. However, that is done with, and have come to the conclusion that you may have let your holder, and that it would not justify me to incur the expense of going to Minneapolis unless my proposition should prove the best one for you. I will furnish you erected in tank, at Minneapolis, a holder, as per the plans and specifications, for the sum of ($9,970.00) nine thousand nine hundred and seventy dollars.

This proposition includes the inlet and outlet pipes to tank,

wall plates, all the guide-rails, and brackets for guiding holder, &c., but has nothing to do with brick or carpenter work in building or tank, as—there is no use talking—you can put up the work cheaper than any outsider. 107

I am under the impression that you can build the tank and building as per the plans for less money than any other way. As stone is cheaper with you, it may be better to build the entire house of stone; in fact, the tank can be built of stone, although a stone tank uses a large amount of cement. The two benches of 6's, iron work, not including buck-bars nor st.-pipe through the roof, regular price to-day $435.00 per bench; will furnish yours at $425.00, or $850.00 for the two benches, f. o. b. cars, Fort Wayne. Should you accept my proposition on the holder I presume that I will have to come and see you.

I remain yours respectfully,

KERR MURRAY.

EXHIBIT 12.

MINNEAPOLIS, MINN., *April 11th*, 1880.

K. Murray, Esq.

DEAR SIR: Your plans and proposition received. I am some in a muddle about them and what to do. We want the holder ready for use November 1st. We know iron is on the down grade. While we don't want to cause loss to the holder builder, still we want to avail ourselves of the market decline until it is necessary to buy the iron to work up. Will you consent to a clause in the contract fixing the price for, say, April 1st, and the price, as it may be or may vary, until, say, September 15th, to be added to or deducted from the contract, as the case may be? This is to be calculated on the basis of 90,000 lbs. for the job. Such an arrangement would put the fluctuation of the iron market on us and ensure to you your manufacturing profit. There is not a hundred dollars between your bid and that of one Philadelphia house, and one of you will get it sure. You see, Murray, we must decide now, as we have the tank and building to build, and must build them to fit the plans of the party whose holder we buy to fill it. If you are favorable to such a deal as noted herein, and prepared to remedy some little defects to correspond to the needful requirements, and which are covered in other bids, and will come down that solitary $100, or shrink some on the benches, come and see us, and we will try to do some business; if you, on the other hand, feel that you have no inclination to do so, please write us at once, and we will have an opportunity to confer with Darley & Fowler as to their bid. The thing, Murray, is narrowed down between you and one opponent. They claim you have never and cannot build a telescopic holder. Think of that, old man! We are willing — you to learn your trade in Minneapolis. 108

Truly, H. W. BROWN, *Sup't.*

P. S.—Don't wait three months, as usual, before you answer this letter.

EXHIBIT 5.

FORT WAYNE, IND., *April 14th*, 1880.

H. W. Brown, sup't gas-works, Minneapolis.

DEAR SIR: Your favor of the 11th inst. is received. I am willing that you should have the benefit of the decline in the iron market. You know I wrote you that iron was too high and must come down. The 15th of September is too long ahead, as it will be necessary to purchase that iron in May, so as to have everything in Minneapolis by the time you have the tank and building done. My estimate on your holder is based on bar-iron—price, 3½ cents. The card-list at that time was four cents per pound, but I had a confidential offer for thirty days before at 3½ cents. I am in receipt of an offer this a. m. at 3¼ cents. Hoping to see it at three cents, you shall have the benefit. At 3¼ it makes a difference in your favor of $225.00; at three cents, in your favor of $450.00.

Suppose I made a contract for May delivery and give you the benefit—the price that they will agree to put that iron on cars, say, last day of May; that I think the most fair way to get at it. You are aware that double-refined iron (and that is the only kind
109 that is fit for holders) does not fluctuate quite in the same proportion as common bar. I have written to Graff, Bennett & Co., Pittsburgh, to see just what they will do in this matter, and will notify you as soon as I hear from them.

Please inform me how you like the above arrangements and, if everything is satisfactory, I will come up and see you at once.

I remain, yours respectfully,

KERR MURRAY.

EXHIBIT 4.

MINNEAPOLIS, MINN., *April 16th*, 1880.

Kerr Murray, Esq.

MY DEAR SIR: Yours received, and I don't see any very great difference between us—at least, not enough to prevent our getting together if you were here; something about the plans, I think, should be a trifle different and, besides, I think the iron should not be bought before July, at least; of course, it must be in time to complete the work, but iron must come down to at least within ten per cent. of the price last year. I am anxious to get it closed up, as we want to commence on the tank, and we shall build to the plans of the one who builds the holder. Every day brings letters reducing bids and complaining that we are showing preferences, etc. I want to take my time about the tank and building, and want to be entirely out of the way when the iron arrives. The plans you sent do not give suitable foundations to carry the building; you know, after the tank is in, the ground around it on the outside is not fit to start a building on, as it is all filled ground and will settle too much for a good job. But then all those things can best be handled and talked over when you get here. Come up next week sure.

Yours truly, H. W. BROWN, *Supt.*

EXHIBIT 6.

F'T WAYNE, IND., *May 3d*, 1880.

H. W. Brown, sup't gas Co., Minneapolis, Minn.

DEAR SIR: Enclosed please find specifications of tank and building; also detailed plans and section of tank and roof.

110 There may be some changes you will want to make or that I would make if on the ground. We must adapt the plans, &c., to suit the different locations. I have heard Mr. Murray speak of the cheapness of stone in your locality in comparison to brick, and it might be cheaper to build the entire building with stone. I do not think you will have any difficulty in understanding the plans and specifications. You can commence on that at once, and as soon as Mr. Murray's health will permit he will come and see you, and in the event of his not being able to do so soon the writer will come and see you, and have no doubt but everything can be arranged satisfactorily. As you are aware, iron is dropping in price every day. You will not lose anything by the delay. If you desire we can make the drip-boxes, ells, tees, tank-plates, etc., at once, and send them, so you will have nothing to delay you on the tank.

Please let us hear from you by return mail. I am sorry to inform you that Mr. Murray is in a very critical condition, but we trust he will soon be able to be out again. Hoping all will be satisfactory, I remain,

Yours truly,

KERR MURRAY,
By A. D. CRESSLER.

P. S.—If there is anything you do not understand please write and we will endeavor to make it plain.

EXHIBIT 7.

(Copy of order appearing on page 224 of plaintiff's order-book, containing orders from September 14, 1877, to December 30, 1880.)

MINNEAPOLIS GAS LIGHT CO.,
MINNEAPOLIS, MINN., *June 11th*, 1880.

One telescopic gas-holder.
Eight double base plates for guide-rails, eight foundation plates.
Sixteen foundation bolts $\frac{3}{4}$ x 3 ft. 6 in., 16 $\frac{5}{8}$ bolts x $2\frac{3}{8}$ in.
One p's 10-in. pipe, with nub and flange.
One 10-in. drip, one 10-in. L, one 10-in. T, and one 10-in. plug.
One 12-in. drip, one 12-in. L, one 12-in. T, and one 12-in. plug.

111 Sixteen tank-plates, 20 feet long.
One hundred and twenty-eight anchors for tank-plates.

EXHIBIT 8.

MINNEAPOLIS, MINN., *June 21st*, 1880.

A. D. Cressler, Esq.

DEAR SIR: Please send us a tracing on oiled paper, or something that won't tear, of the roof of the holder building. The one you

sent is all torn up. Have the measurements and figures denoted full and complete on it. We have the excavation for the tank nearly done, and expect to have the building complete for iron-workers by the 15th of September, if not 1st of September. We shall try to have holder ready for use by Nov. 15th, if not Nov. 1st. Don't contract for work that will interfere with the above.

I want to see whether your shops can build a telescopic holder. All your competitors say that you cannot, and as we are to be the first that chances it, I want it perfect first time.

Yours truly, H. W. BROWN.

EXHIBIT 9.

MINNEAPOLIS, MINN., *June* 28, 1880.

Kerr Murray M'f'g Co.

GENTS: Below I give you length of dip-pipe, as requested. It is 13¾ inches long from lower side of the flange. How are you fixed for work? Can you have the holder done ready for use by November 1st? We find we can't get along without it, and must have it then. Tank and building will be done September 15th. Write me about it by return mail, and oblige,

Yours truly, W. H. BROWN, *Sup't.*

EXHIBIT 10.

F'T WAYNE, IND., *June 30th*, 1880.

H. W. Brown, sup't gas light Co., Minneapolis, Minn.

DEAR SIR: I arrived home to-day, and find your favors of
112 21st and 28th insts. As you informed me when in your city that you did not expect to be ready for the holder before Nov. or Dec., I have made contracts that I am afraid it will be impossible to ship your holder before the 1st of Nov. at the earliest. I have two 60 x 20 and one 50 x 20 holders to complete by Oct. 15th, besides a large number of purifiers, condensers, &c.; so we are considerably crowded. We will ship your bench castings and tank work first of next week. The price of iron is the same as when I was in Minneapolis, viz., 2½ cents, and they are holding somewhat firmer than several weeks ago. Please inform me by return mail if I shall place the order at once. I will make a strong effort to get the holder shipped by Oct. 15th. In reference to whether our shop can build a telescopic holder, we know no such word as fail, and always make a perfect job first time.

Yours truly, KERR MURRAY M'F'G CO.,
By A. D. CRESSLER.

EXHIBIT 13.

MINNEAPOLIS, MINN., *July 1st*, 1880.

Kerr Murray M'f'g Co., Fort Wayne, Ind.

GENTS: We wish you to have material, men, etc., here to commence the work of erecting our gas-holder September 1st, and to have the same completed, ready for use, not later than November 1st next. We expect to pay you therefor the price set forth in Mr.

Kerr Murray's letter to us under date of April 5th, and as modified in his letters of April 14th and May 3d, 1880. We shall have the tank and building ready for you September 1st. Please ship us at once the inlet and outlet iron-work. We shall be along with the tank to a point where it should be put in by Tuesday next, July 6th. In Mr. Murray's proposals to us under date of April 5th the price of holder complete, all set up, is $9,970.00 (nine thousand nine hundred seventy dollars). In his modified proposal of April 14th, 1880, he states that the above price is based on a price of bar-iron at 3½ cents (three and one-half cents) per pound, card list. He there agrees to reduce his price for the holder two hundred
113 twenty-five dollars ($225.00) for each one-fourth cent per pound decline in the price of iron. We understand that scale follows down to the point or date on which we accept the proposition, and this is to notify you we accept the same to-day and will pay accordingly. We have been explicit in order to avoid any misunderstanding, and wish you to write us at once accepting the conditions and agreeing to carry out Mr. Murray's propositions to us. This will save the necessity of any further written contract. It is, perhaps, useless for us to say to you that we expect the work complete in every detail, and make good, free of cost to us, any omissions, if any, that your specifications omit. We don't know of any, but want all points well and thoroughly understood. Don't forget the inlet and outlet.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 14.

MINNEAPOLIS, MINN., *July 3d*, 1880.

Kerr Murray M'f'g Co.

GENTS: Replying to Mr. Cressler's favor of the 30th of June, would say we have the tank and building well under way, and it will be done not later than Sept. 15th, and probably Sept. 1st. I note what you say about delay in the holder. We find our consumption so large that we cannot get through with what we have, and we must have the work here by Sept. 15th or, in other words, we must have holder done and ready for use Nov. 15th, and not a day later. Our necessities are urgent, and we cannot be delayed or disappointed. If you cannot reach these dates, and surely so, without fail telegraph us on receipt of this, and I will take the next train for Philadelphia and close with Dailey & Fowler, as a holder we must have or let the town out of light. Figure carefully, Cressler, and make no mistake; do it if you can, and if you can don't fail on us, if you have to disappoint everybody else. Why don't you crowd the men in and work day and night? You can't afford to let your trade
114 get scattered. Wire me what you can and will do on receipt of this.

Yours truly, H. W. BROWN, *Sup't.*

P. S.—In ours of July 1st we named the date of completion November 1st, but, you see, in this we stretch it to the 15th, which is the last day.

EXHIBIT 15.

F'T WAYNE, IND., *July 7th*, 1880.

H. W. Brown, sup't gas Co., Minneapolis, Minn.

DEAR SIR: Your favor of the 3d inst. received and noted. The contracts for the iron for your holder are all made and promised shipped this month. We will do everything in our power to have your holder shipped by the 15th of September. We are working full force now night and day, and plenty of orders coming in every day without soliciting. I ordered the straight 10 and 12 pipe shipped from Dennis, Long & Co. They stated they would ship on a car with yours. Trusting all will be satisfactory, we remain,

Yours resp., KERR MURRAY M'F'G CO.

EXHIBIT.

MINNEAPOLIS, MINN., *Aug.* 7, 1880.

Kerr Murray M'f'g Co.

GENTS: We cannot go on with the brick-work inside the tank for the reason we have no plan showing the location of the wall-plates and the location of the anchors. You wrote us you would furnish us with such a plan, but it has not come. The stone wall is up, the bottom in, and the brick wall started, which the masons are now building. We could set your men at work putting in some work now if they were here and your work here. Bear in mind we must not be delayed beyond the agreed time on this work, no matter if all the gas companies in America are disappointed, as we can't stand any delays and keep the town in light. We are sending out 90,000 nightly, and running up rapidly with only 50,000 holder capacity.

Yours truly, H. W. BROWN, *Sup't.*

115 EXHIBIT 16.

MINNEAPOLIS, MINN., *Aug.* 13*th*, 1880.

Kerr Murray M'f'g Co.

GENTS: Mr. Cressler remembers the 10-inch valve in our cellar we are to connect onto, to go into the new holder, and that we want a piece of 10-inch pipe with one flange end to connect onto this valve. If we had this we could now connect up our inlet. If you can make the governor valve as per tracings when you were here do so. If not, send us one 12-inch valve with stem to reach through the floor and a cast-iron standard to set on the floor, and wheel located on the top of the standard like the tracing Cressler has, except omitting position of valve face and gauges. Please have these and balance of the bench castings on the next car shipped. If we had them now we could connect up the inlet and outlet with the works and street. We are all ready for you now. Please don't forget the 12-inch T for the outlet.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 17.

MINNEAPOLIS, MINN., *Aug.* 23*d*, 1880.

Kerr Murray M'f'g Co.

GENTS: The tank is ready for you now, and I wish you were now ready for the tank. Don't forget in your first car shipment to send the balance of the bench castings, the 12-inch T for the outlet at the holder, the 10-inch piece with the flange end to connect onto the valve in our cellar, to continue on into the new holder, and the 12-inch governor valve on the outlet, as ordered. These will enable us to connect up our inlet and outlet pipes with the works and street and set our new benches in motion. We do hope that you will crowd the holder, so as not to be a moment behind hand, as our necessities are most urgent.

Yours truly, H. W. BROWN, *Sup't.*

P. S.—The 12-inch valve should have bell ends, or, if flaring ends, it should have two 12-inch flange pieces to connect up with.

116 EXHIBIT 18.

MINNEAPOLIS, MINN., *Aug.* 27, 1880.

K. Murray M'f'g Co.

GENTS: When your shipment, as per bill of lading of the 24th, arrives there is no reason why we can't connect up the inlets and outlets of the new holder with the works and street, except the want of the 12-inch valve. Please ship at once, and be sure (if flange ends) to send flange pieces to go with it. If hub ends, it is all right.

Truly, H. W. BROWN, *Sup't.*

EXHIBIT 20.

FORT WAYNE, IND., *Sept.* 6, 1880.

H. W. Brown, sup't gas light Co., Minneapolis, Minn.

DEAR SIR: Yours of the 3d inst. received. It seems we have not shipped you the lids, cotter-bars, screws, and cars; at least we cannot find memorandum of shipment. We got somewhat mixed about your shipments. Find we have only sent you memorandum of five bridge pipes, but think we sent you full number—twelve. Please report if this is so. Will have 12-inch valve ready to ship next week, and getting along finely with holder. How is the building progressing? Have you got the roof on yet?

Yours truly, KERR MURRAY M'F'G CO.

EXHIBIT 21.

MINNEAPOLIS, MINN., *Sept. 6th*, 1880.

Kerr Murray Man'f'g Co.

GENTS: We are now sending out nightly over 100,000 feet of gas, and have only 55,000 holder capacity. Every night the call is for more. We have two new benches of sixes ready—that is, we would have if we had the lids, cotter-bars, etc. We want and must have

them without delay. Why are they delayed? I again urge
117 you to be prompt about the holder. We are not in any condition to be put off or delayed. Promptness will make us everlasting friends, and delays will create unpleasantness all around.

Yours truly, H. W. BROWN, *Sup't.*

P. S.—Write me how you progress.

EXHIBIT 22.

MINNEAPOLIS, MINN., *Sept.* 8, 1880.

K. Murray Man'f'g Co.

GENTS: I hasten to reply to yours of the 6th inst., received this p. m. On the bench work we are short all the lids, cotter-bars, and ears; also seven bridge-pipes and six stoppers or plugs; also the extra lids to replace the ones of last season. I supposed you were cognizant of this shortage from your letter subsequent to shipment, in which you say the balance of bench work would be ready soon. About the holder tank, that has been ready some time; it is now entirely finished and ready for you. The building is above the windows and going up at the rate of two feet per day; it is floored over with rough flooring above the windows to prevent debris, etc., from dropping into the tank. We expect you promptly on the 15th of September. Hasten the bench castings as I want to use the benches.

Yours truly, W. H. BROWN, *Sup't.*

EXHIBIT 23.

FORT WAYNE, IND., *Sept.* 10, 1880.

H. W. Brown, sup't, Minneapolis, Minn.

DEAR SIR: Yours of the 8th received. We are using every effort possible to get out your work, and expect to ship all balance bench castings to-morrow, except the extra lids to replace old ones. These will be made as soon as in our power.

Yours truly, KERR MURRAY M'F'G CO.

118 EXHIBIT 24.

MINNEAPOLIS, MINN., *Sept.* 18, 1880.

A. D. Cressler, Esq.

DEAR SIR: I cannot deny our great anxiety about our new holder, and am fearful that you are going to delay us.

Wish you would write us what we can expect, and when you will be here to commence the work, and when we can depend upon it that we can have it for use. We are in the mire-holes for want of holder room, and it's growing tighter and tighter every night. Do you appreciate our necessities? The tank is fully completed long ago. Building all done up to the roof; in fact, the whole thing is done, so far as your work would be affected.

Yours truly, H. W. BROWN, *Sup't.*

Why in the world didn't you ship us that 12-inch valve with the last lot?

EXHIBIT 26.

MINNEAPOLIS, MINN., *Sept. 24th*, 1880.

K. Murray M'f'g Co.

GENTS: One week ago to-day I wrote you asking about the progress you were making and when we could expect shipment of holder, but we get no reply. I hate to think you are trifling with us, and trust you are not. You know you well understood our necessities when we ordered the work. The time has passed when the work was to be commenced, and if equal delays occur in the completion we might as well face the fact that we cannot supply our city first as last. In short, gents, we will not submit to be trifled with; you must calculate not to do so. We wish to know the exact facts and what we can expect.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 25.

FORT WAYNE, IND., *Sept.* 25, 1880.

H. W. Brown, sup't, Minneapolis, Minn.

119 DEAR SIR: Your favor of the 18th inst. to hand and contents noted. I have just returned from Pittsburgh, where I found the mill men all from three to four months behind with their orders. I placed the order for 6-inch channel iron for your holder on July, and have thus far been unable to have it filled. Caniegie Bros., of Pittsburgh, are the only parties who make the size, and they have more than they can do. They have made promises both by telegraph and letter, but the iron does not come. I went to Pittsburgh to see if I could not hurry them (and other work), but the best I could do was to accept the promise to ship next week. I have the sheet-iron, top and bottom angle iron curb, all ready to ship; can do nothing toward erecting until we have the channel iron for the cups. We are now riveting the side sheets into sections of four, so as to save as much time as possible when we get to Minneapolis. We can ship all in from three to five days after receiving the channel iron. We had to make pattern for 12-inch valve, which will be cast to-day and forwarded as soon as completed. The regulating gauge we will have to make this winter when we have a little time. We have been running the works fifteen hours per day since June and are turning out a large amount of work. The extra mouth-piece lids will be sent with the holder. Our machine for pressing them broke down, and we have had to make shift for the present until we get time to make a new machine. If iron comes as promised we can ship holder by the last of next week.

Yours truly, A. D. CRESSLER, *Manager.*

EXHIBIT 27.

MINNEAPOLIS, MINN., *Oct. 15th*, 1880.

Kerr Murray M'fg Co.

GENTS: If you were here and in my position I know you would not feel kindly at the way we are ignored and delayed in our work.

My last information from you was September 25th, in which you promise shipment of the holder "next week," or over one
120 week ago. Of course, I realize we have no right to complain until the expiration of the time for the completion of the work; but could it be possible to do so I would pay largely for the use of the holder at this moment. We are sending out over three times the full of our holders every night, and still it is increasing, and what in the world I am to do beats me. We must have that holder and no mistake, and, gentlemen, you must not disappoint us; we can't stand it. We are in distress.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 28.

FORT WAYNE, IND., *Oct.* 27*th*, 1880.

Minneapolis Gas Light Co.:

GENTLEMEN: The channel iron arrived Saturday, too late to do anything that day; but Monday morning we commenced with a double gang of men on your holder, and will keep them on. We are getting it ready fast—as fast as it would be possible under any circumstances. We can ship a section by Friday of next week sure, with every exertion to make it earlier; so our man can go up and commence the erection the following week. We are much in need of money now, and wish you would send us about two thousand dollars on account. We have already paid for a large portion of the material for the holder, and have two large notes coming due now on account of the same. We expected to have had the material all in your works and partially erected before asking you to advance us for the material; but this expectation, formed when we made our settlements, has not been realized, solely on accouut of delay of channels, for which we certainly are not to blame, as we used every possible means and expense to get them. As it is we will get the holder up before contract time, and just as fast now as a holder can possibly be rushed.

Yours truly, KERR MURRAY M'F'G CO.,
N.

121 EXHIBIT 29.

MINNEAPOLIS, MINN., *Oct.* 27, 1880.

K. Murray Manufacturing Co.

GENTS: Please do not omit to include our extra lids for mouthpieces and the twelve-inch valve in the first car shipped. We especially need the lids now badly. We are running thirty retorts and have only five extra lids. No one on earth ever needed a holder as bad as we do now. We cut the pressure down to one inch on the town in order to get through, and it is a constant fight with our patrons, besides being expensive to us, and the Lord only knows what night the lights will go out in spite of us. By your dispatch of 21st, allowing five days, as you before wrote, to bend the channel iron, you should make shipment to-day. I trust that I am correct, and that the holder is on the way.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 3 in H. W. Brown's deposition.

MINNEAPOLIS, MINN., *Oct. 29th*, 1880.

K. Murray Manufacturing Co.

GENTS: Your favor of the 29th received and contents noted. You may draw on us at thirty days' sight for $2,000.00, which we will accept and pay. We are rejoiced to know that you expect to get the holder up at the time contracted for, and truly hope you will succeed. Surely we need it badly enough. I can only say, don't waste a moment until it is done.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 30.

MINNEAPOLIS, MINN., *Nov.* 3, 1880.

K. Murray Manufacturing Co.

GENTS: In the measures herein given across the tank is from wall-plate across to wall-plate. Each plate is one-half inch, making brick-work seventy-four feet and one-quarter inch from brick to brick. From the inside face of the wall-plate to timber in 122 recess of pilaster is four feet one-quarter inch. If you want it from the inside face of tank (that is, the brick face) deduct from the measure given for the thinkness of wall or tank-plate, which is one-half inch. You can calculate, first, the tank is perfectly round, and within one-eighth inch anywhere of the size noted on the plans; second, the face of the tank is perfectly plumb; third, the building is exactly of the dimensions and character called for in the plans, and if the work won't go in all O K it is because of error with you, as I know we have fulfilled the plans.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 31.

MINNEAPOLIS, MINN., *Nov.* 8, 1880.

K. Murray Man'f'g Co.

GENTS: We received bill of lading of one car of iron-work to-day, dated the 6th inst. We can't understand why you omitted to put in the twelve-inch valve and the extra lids. We want and must have them. If you cannot ship them without further delay, please so write us, and we will supply ourselves elsewhere. In short, we can't be so bothered and delayed in our work any longer.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 32.

MINNEAPOLIS, MINN., *Nov.* 15, 1880.

K. Murray Man'f'g Co.

GENTS: I think the first car of iron is in town. I saw one on the track at the C. M. & S. P. yard this a. m. I wish we had it ready for use to-day, as the Lord only knows how we suffer for want of it. When will the balance be shipped, and when will your men be here?

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 33.

FORT WAYNE, IND., *Nov.* 19th, 1880.

H. W. Brown, sup't gas-works, Minneapolis, Minn.

123 Our workmen leave here Sunday night to erect your gas-holder.

Yours truly, KERR MURRAY M'F'G CO.

EXHIBIT 34.

MINNEAPOLIS, MINN., *Nov.* 24*th*, 1880.

K. Murray Man'f'g Co.

GENTS: Shall we pay such bills or money as your foreman calls for to enable him to push the holder work? If so, please send us letter of authority. Two cars of iron have arrived all correct, and your two men went to work yesterday. We trust you will crowd it, as the Lord only knows how we need the holder.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 35.

FORT WAYNE, IND., *Nov.* 26*th*, 1880.

H. W. Brown, sup't gas light Co., Minneapolis, Minn.

DEAR SIR: Yours 24th inst. received. Please pay our foreman at your works such amounts of money as he may require from time to time on the holder work, and charge the same to our account; will use every exertion to push the completion of the holder rapidly. Our Mr. Cressler is now East. He will be up to see you before long.

Yours truly, KERR MURRAY M'F'G CO.,
N.

EXHIBIT 36.

MINNEAPOLIS, MINN., *Nov.* 27*th*, 1880.

K. Murray Man'f'g Co.

GENTS: It seems to me to push this holder work to an early completion you should have more men here. Your two men here now, of course, make but slow progress on so large a job. I believe your foreman has hired two riveters, but up to this time they have not gone to work; skilled labor is very scarce here, but helpers are plenty. Can't you send on about a dozen (or as many as can
124 work) of skilled men, and crowd it; no gas company in the world was ever so hard pressed for a holder as we are, and we count the minutes ahead when we are to be relieved. Please reply to my letter of the 24th inst. without delay, as I don't want to take too much responsibility without authority.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 37.

FORT WAYNE, IND., *Dec. 8th*, 1880.

H. W. Brown, sup't gas light Co., Minneapolis, Minn.

DEAR SIR: Enclosed please find bill of lading of car-load of holder material, which we trust will go forward with quick dispatch. Will send memorandum of loading to-morrow. We took the liberty of drawing on your company to-day, thirty days after date, for $1,000 and trust the draft will be duly honored. We have considerable paper coming due against ourselves, and Mr. Cressler having to leave for the West to-day, we had to make use of the draft for present wants.

Yours truly, KERR MURRAY M'F'G CO.,
N.

EXHIBIT 38.

MINNEAPOLIS, MINN., *Dec. 10th*, 1880.

K. Murray Man'f'g Co.

GENTS: We have your letter of the 8th advising us you had drawn on us for one thousand dollars, etc., and replying thereto, are undecided what to say. The case stands just here: We agreed with you for this holder completed by the middle of November, and despite our most urgent entreaties we are unable to move you or get any reason from you why the work has been delayed or is in its present condition. You are aware that the work stands to-day practically abandoned, your men gone home, and the whole thing entirely at a stand-still. I submit this is unfair treatment, and have concluded, before acting on or accepting your draft to await your reply to this letter. First, I want you to inform me what
125 your excuse is for not having the holder done the middle of last month, as contracted for. Second, what the probabilities are and when we can expect its completion. If I can have your excuses and promises of such a character that will allay the misgivings of those interested, I will feel that we are forwarding our mutual interests by protecting the draft, and in the meantime I will ask the bank to hold it awaiting your return letter. You are aware how we are disappointed and can well imagine *if* our misgivings when your men abandon the work as they have done.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 39.

FORT WAYNE, IND., *Dec. 13th*, 1880.

H. W. Brown, sup't, Minneapolis, Minn.

DEAR SIR: Your favor of the 10th inst. received. We have had the best disposition in the world to accommodate your company to the utmost extent, and respond as promptly to your wants as you could desire, but unfortunately have not had the ability to do all we would have liked to have done. Our inability has been due in the main to the delay in mills in shipping us material, as we explained

heretofore Then it was understood here that you would not require the holder before Christmas. Mr. Cressler and our other chief parties here even say that you spoke of giving us all winter. Consequently about the time you began to be pressing, some two months ago, we were organized on one or two other contracts, which had a time limit under forfeiture, and could not be entirely abondoned. Owing to the scarcity of skilled labor, we have been obliged to divide our force on yours and the other pieces of work, greatly delaying the others beyond the time. We have done the best we could with the help we could get, and have every disposition to expedite your work, but cannot entirely abandon everything else and put all our force on it. There is no contract with your company as to time of delivery, as the writer understands, only the original agreement (informal), as aforesaid, to finish it this winter, or about Christmas.

126 Our workman had no instructions from us to leave Minneapolis when he did. On the contrary, we instructed him what to do until our other man got there, which must be by this time, as he left Sedalia on Friday last. It made a delay of two or three days, as our telegram and letter pointed out how the time could be put in until Dickey's arrival. As the telegram and letter must be in Minneapolis now you are at liberty to peruse them (addressed to Waltermuth), and you will see some of the trouble we have to contend with, with independent workmen. The car-load of material shipped last week is doubtless on your ground now. We will positively ship every pound still to go in another car this week. Our calculations are to commence loading the car on Wednesday, and we ought to get it off Thursday or Friday at latest. Our three skilled men at your works, with the help they can hire in Minneapolis, ought to complete the holder certainly within three weeks. We don't see, therefore, why you cannot have gas in the holder about the 1st of January—certainly not very much later than the time (Christmas) you originally gave us to have it ready. Our orders for material were based on having the work done long before Christmas, and, we repeat, that, if we had not been compelled to wait six weeks on the channel iron and some of the angle iron, you would have had your holder in operation just that much earlier. We do not see how you can justly blame us for the delays.

Yours truly, KERR MURRAY M'F'G CO.,
N.

EXHIBIT 40.

MINNEAPOLIS, MINN., *Dec. 15th*, 1880.

K. Murray Man'f'g Co.

GENTS: Yours of the 13th just received. The car of iron shipped on the 8th has not arrived yet. Dickey is here preparing scaffolding, etc. I note what you say about Christmas being the time agreed upon for the completion of the holder, and must say that I am at a loss to know where or how you got that impression; it certainly does not agree with my understanding of the case; on the

127 contrary, it seems undeniably plain to be that this holder was

to be ready for use by Nov. 15, 1880. In this connection allow me to call your attention to my letters of July 1st and 3d to you. If you can gather any idea from them concerning Christmas as the time to complete, I will honor your order for a hat. I don't deny that I last week believed you had abandoned the work. My reasons for so thinking I will hereafter explain to you. Mr. Rand just went down to the bank and will accept the $1,000 draft, which will when due be paid.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 43.

FORT WAYNE, IND., *Dec.* 30, 1880.

H. W. Brown, sup't gas light Co., Minneapolis, Minn.

DEAR SIR: We believe, in the press of office work, we have neglected until now to acknowledge receipt of your favor of 21st inst., which was duly received, with your order on Co. enclosed for $1,000. We have placed same to credit of account as $1,000, less exchange, $2.50; net credit, $9,997.50; trust that the holder is now nearing completion, and that soon all will be well and past apprehensions forgotten.

Yours truly, KERR MURRAY M'F'G CO.,
N.

EXHIBIT 44.

FORT WAYNE, IND., *Jan.* 3, 1881.

H. W. Brown, sup't gas light Co., Minneapolis, Minn.

DEAR SIR: Wish you all the compliments of the season. In order to enable us to estimate how we stand at the end of the year, in making up balance sheet, will you please report how much, up to December 31st, inclusive, you have charged against us, paid out for freights, labor, and other bills, on the holder contract. The amount in a lump will do—of course not to include remittances sent us, as those we have credited.

Yours truly, KERR MURRAY M'F'G CO.,
N.

128 EXHIBIT 46.

FORT WAYNE, IND., *Jan. 4th,* 1881.

H. W. Brown, sup't gas light Co., Minneapolis, Minn.

DEAR SIR.: Our account against your company shows a balance due us of over $6,700. The bills you have against us cannot reduce it very much, as we have credited all payments to Waltermuth. We have been very patient in regard to payments, but everybody we owe is now drawing on us; we have large sums to raise, and we cannot get through without asking you for a cash remittance of $3,000. In the present state of the holder we think $2,500 is a large amount to be kept back, and we hope you will respond with a draft at once, greatly obliging,

Yours truly, KERR MURRAY M'F'G CO.,
N.

EXHIBIT 45.

MINNEAPOLIS, MINN., *Jan. 5th*, 1881.

K. Murray M'f'g Co.

GENTS: Replying to yours of the 3rd, which was received to-day, I would say that I will send you the desired statement in a few days. We are closing our 1880 accounts now and opening our books for 1881. Your men commenced this a. m. on the outside section; they think they can get it ready by February 1st, to let the water in the tank.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 4 in H. W. Brown's Deposition.

MINNEAPOLIS, MINN., *Jan. 8th*, 1881.

K. Murray M'f'g Co.

GENTS.: Replying to yours of the 4th, received, we cannot send you the money desired, for the reason we do not owe it to you. The cash we have paid you and the damages we have against you for the non-fulfillment of your contract for the completion
129 of the holder more than pays you in full; yet we have to keep on paying in order to keep your men at work; what I mean by this is that your workmen must be paid. There is no other means of their being paid except through your directions for us to give your foreman money. As we think they should be paid, we will pay your pay-roll from week to week. I wish to protest right here that your work is not up to the specifications, and we reserve all our rights in that particular. When we use the holder we do so under protest, and reserving all our rights for non-compliance as to time and also as to quality and character of work.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 47.

MINNEAPOLIS, MINN., *Jan. 19th*, 1881.

K. Murray Man'f'g Co.

GENTS: I am going away to-day for a month or two, and write you before going that the holder is nearing completion, and when your men are through we will use it at once, of course; but in doing so we cannot, and do not, waive any rights for damage by reason of your non-compliance with the terms of your contract with us for the erection of this holder, both as to not fulfilling the specifications and failure to complete at the time agreed upon. When I return, if the holder works well, I will do all in my power to adjust our differences (providing there are any) in a manner pleasant to both of us.

Yours truly, H. W. BROWN, *Sup't.*

EXHIBIT 48.

MINNEAPOLIS, MINN, *April* 21*st*, 1881.

K. Murray Man'f'g Co.

GENTS: We to-day refused your draft for three thousand dollars as presented to us for payment by the First National Bank. The enclosed statement of your account explains why it could not be paid. You will observe the debits amount to $14,084.31. In addition to the above we will have a debit for damages and for
130 the non-fulfillment of your contract, both with reference to omissions in the specifications and the very poor manner the work is constructed. So many departures from the specifications have been made that, in our opinion, the job is almost worthless, and we shall require the opinion of experts to verify our own and help us determine the amount we are justly entitled as an abatement from the contract price. Among such variations you agreed to use only annealed iron. This you failed to furnish. It is an open question whether we should not have two full twenty-foot sections, whereas fifteen inches is deducted for the cups. There should have been a rail on top, which you omitted. All the chain and counter-balance work is vastly different from the agreement. Whereas the specifications called for eight channel iron wall-plates, you send only flat cast-iron wall-plates. I might continue for a long time on these omissions, but doubtless you know as well as I do. The workmanship is certainly the worst I ever saw. It is a complete failure; it does not ride true, tips much of the water out of the cups, and is a mass of daub and putty to stop leaks; the leaks were literally by thousands. Again, the outer section leaks so where the wheels connect to the angle iron we can't raise it up out of water within some sixteen or eighteen inches. We have yet to charge you the loss of gas by reason of this leaky holder, and by reason of being compelled to maintain full day pressure from November 15th, 1880, to February 19th, 1881, to fill our Sixth-street holder by reason of your non-fulfillment of your contract. I conclude by saying, if we can do so, we shall rebuild this holder this summer, and we then can better determine what is just and right. In the meantime we reserve all our rights in the premises, and waive none of them. You will observe you are in our debt to some extent, by the statement herewith. Please favor us with draft in the amount to such extent as we agree, and if we should not agree, say wherein we differ, and exceedingly oblige,

Yours truly, H. W. BROWN, *Sup't.*

131 "EXHIBIT 11."

Telescopic Gas-Holder to be Erected for the Minneapolis Gas Light and Coke Co.

General dimensions.

Outer section to be seventy-two (72) feet diameter and twenty (20) feet high.

Inner section to be seventy (70) feet and six (6) inches (70 ft. 6 in.) in diameter and twenty (20) feet high on the sides.

Outer section.

The outer or lower section shall be seventy-two (72) feet in diameter and twenty (20) feet high, the sides to be supported by sixteen (16) vertical stiffeners, the bottom curb of angle iron, and the hydraulic cup of channel and heavy sheet iron.

Side sheets.

The side sheets shall be disposed in ten (10) rows, each row measuring twenty-four (24) inches in height from centre to centre of holes. Each row shall consist of fifty (50) sheets fifty-four (54) inches long [from] centre to centre of holes; the upper course to be composed of sheets of No. eight (8) B. W. G., weighing six $\frac{65}{100}$ lbs. to the square foot; the lower course to be of No. nine (9) B. W. G., weighing five and $\frac{96}{100}$ lbs. to the square foot; the remaining
132 eight (8) courses to be composed of No. fourteen (14) B. W. G., weighing three and $\frac{34}{100}$ lbs. to the square foot. The sheets are to be so placed that the vertical seams of the alternate courses will be in the middle of the sheets of the adjoining courses. The sheets are to be riveted together with one-fourth ($\frac{1}{4}$) [inch] half-round button-head rivets, spaced one (1) inch apart, centre and centre, and driven on the inside.

Lower curb.

The lower curb shall be composed of four by four by one-half ($4 \times 4 \times \frac{1}{2}$) inch angle iron, curved hot to a radius of thirty-six feet, the bottom flanges projecting outward. Where the sections join each other the ends must be planed and well butted together and reinforced with equal sections of metal twenty (20) inches long and secured to each section by six (6) five-eighths ($\frac{5}{8}$) inch rivets driven hot.

Hydraulic cup.

The hydraulic cup, fifteen (15) inches deep, extending around the upper edge shall be inverted and composed of six by two and one-half by three-eighths ($6 \times 2\frac{1}{2} \times \frac{3}{8}$) inches channel iron, curved hot to a radius of thirty-six (36) feet on outer edge; the ends of the section to be planed and well butted together and secured with plates of equal sections of metal sixteen (16) inches long and not
133 less than three-eighths ($\frac{3}{8}$) inches thick, to fit accurately the sides and bottom of channel iron, and to join each section by five-eighths ($\frac{5}{8}$) inch rivets in each, driven hot.

Cup-sheet.

The inner side of cup or cup-sheet shall be of sheet-iron, No. five (5) B. W. G., weighing eight & $\frac{85}{100}$ lbs. to the square foot; shall be of sufficient width to make the cup fifteen (15) inches deep; the

lower edge of this sheet, to be stiffened by a bar of oval iron one and one-half by three-fourths ($1\frac{1}{2} \times \frac{3}{4}$) inches, the ends to be scarfed to form a lap of at least four (4) inches, and secured with four (4) three-eighths ($\frac{3}{8}$) inch rivets each, to be riveted to the sheet with ($\frac{3}{8}$) three-eighth-[inch] rivets four (4) inches apart, the rivets to be countersunk on each end.

Vertical stiffeners.

Sixteen (16) vertical stiffeners or legs, composed of buckle, plate, or bead iron, six (6) inches wide and one and one-half ($1\frac{1}{2}$) inches at highest point and three-eighths ($\frac{3}{8}$) inches thick, to extend from bottom of channel iron in cup to the bottom of lower curb; to be secured to lower curb by four (4) half ($\frac{1}{2}$) inch rivets and to the side sheets with three-eighths ($\frac{3}{8}$) inch rivets twelve (12) inches apart [at] centres; they shall be perfectly straight and true and placed around the sides at equal spaces, to form the track of the internal cup-rollers.

134 Rivets.

The rivets in the bottom curb shall be three-eighth- ($\frac{3}{8}$) inch, flat heads, spaced two (2) inches apart, centre to centre; in the cup three-eighth- ($\frac{3}{8}$) inch and spaced one and one-fourth ($1\frac{1}{4}$) inches apart, centre to centre.

Tank-carriages.

There shall be sixteen (16) adjustable carriages, with rollers secured to the bottom curb and lower sheet opposite the vertical stiffeners of the outer section with four (4) five-eighths ($\frac{5}{8}$) bolts; the diameter of roller shall be eight (8) inches, with a four (4) inch face to work against the wall-plates, secured to *to* wall of tank; the diameter of pin for rollers shall be one (1) inch; the holes in rollers shall be drilled true, and they shall work smooth and perfect.

Double cup-rollers.

On top of cup of outer section there shall be eight (8) adjustable double cup-rollers and carriages. The outer rollers shall be grooved and set in a movable frame and work against the guide-rail that is fastened to the wrought-iron brackets and building; the inner rollers to be adjustable, with six (6) inch face, and work against the friction-plates of inner section. Each roller shall be turned true in a lathe and provided with a turned pin of one (1) inch diameter; the holes to be drilled true, that they may work perfect; the
135 carriage or frame work to be secured to the cup with six (6) five-eighths ($\frac{5}{8}$) inch bolts.

Single cup-rollers.

There shall be eight (8) adjustable single cup-rollers and carriages secured to outer cup, equally spaced between the double cup-rollers, to work against the friction-plates of inner section. They shall have a six (6) inch face and the carriage secured to the cup by four (4)

three-fourth ($\frac{3}{4}$) inch bolts; all the rollers to be turned, holds drilled and supplied with one (1) inch turned pins.

Inner section.

The inner or top section of holder shall be seventy (70) feet and six (6) inches (70 ft. & 6 in.) in diameter and twenty (20) feet high on the sides.

Side sheets.

The side sheets of this section shall be arranged in precisely similar manner to those specified for the outer section. The lower course of sheets, to which the channel iron for the hydraulic cup is attached, shall be of No. five (5) B. W. G., weighing eight $\frac{85}{100}$ lbs. to the square foot. The upper course attached to top curb angle iron shall be No. nine (9) B. W. G., weight five (5) and $\frac{90}{100}$ lbs. to the square foot. The remaining eight courses shall be No. fourteen (14) B. W. G.; rivets half round button head, five sixteenth ($\frac{5}{16}$) inch diameter, one (1) inch a part, centre to centre.

136 Hydraulic cup.

On the bottom edge of this section, projecting outward, shall be placed a hydraulic cup constructed in size and material in a manner precisely like the inverted cup on outer section, except in the length necessary to the decreased circumference.

Top curb.

The side and crown sheets are to be connected together by a top curb of angle iron four by four by one-half ($4 \times 4 \times \frac{1}{2}$) inches, the ends of the sections to be planed and well butted together with equal sections of metal twenty-four (24) inches long; the iron to be opened in the angles so that the crown sheets may lie flat upon it; the iron to be bent hot to a radius of thirty-five (35) feet and three (3) inches (35 ft. 3 in.), to be riveted to the side sheets with three-eighth-($\frac{3}{8}$) inch flat-head rivets spaced one and one-fourth ($1\frac{1}{4}$) inches apart, centre to centre, and the rivets driven on the outside.

Vertical legs, inner section.

On the inside of this section, divided in equal sections, shall be sixteen (16) vertical legs, eight (8) of which shall stand opposite the girder-rails attached to the building. Each leg shall be composed of two bars of angle iron two and one-half by two and one-
half by three-eighths inches ($2\frac{1}{2} \times 2\frac{1}{2} \times \frac{3}{8}$), placed back to back
137 and riveted to a blade of flat iron six (6) inches by one-half ($\frac{1}{2}$) ($6 \times \frac{1}{2}$).

Diagonal brackets.

On each of the vertical legs that stand opposite the guide-rail shall be placed the two (2) diagonal braces one (1) inch in diameter to support the top guide-wheel stands.

of sufficient width

Friction-plates.

On the outside of this section and opposite the vertical legs shall be placed sixteen (16) friction-plates, to extend from the bottom of the cup to the top of the curb, eight (8) of which shall extend twelve (12) inches above the top curb and terminate in eyes to receive the guard-railing that is to extend around the top of the holder. They shall be composed of flat bar-iron six (6) inches wide by three-eighth-($\frac{3}{8}$) inches thick ($6 \times \frac{3}{8}$). They are to be perfectly smoothe and straight and form the track of the barrel-rollers on the bottom of the inverted cup. These plates are to be drilled with countersunk holes twelve (12) inches apart to receive five-eighth ($\frac{5}{8}$) inch flush-head screw-bolts that are to pass through the side sheets and projecting flange of vertical legs and to be screwed up on the inside.

138 Internal cup-roller.

There shall be sixteen (16) adjustable internal cup-rollers and carriages secured to the bottom of hydraulic cup of inner section to work against the buckle or bead-ptate stiffeners of outer section, the rollers to be six (6) inches in diameter and of a proper face to traverse vertical stiffeners. Each carriage shall be secured to cup with four (4) five-eighth ($\frac{5}{8}$) bolts.

Crown sheeting.

The crown to be known as a flat top, with pressure to be in the form of a segment of a sphere, with the sheets disposed in regular circles with their edges radiating from the centre, the radiating joints of each circle not to come nearer than six (6) inches of joints of adjoining courses, but as near as practicable to be intermediate. The outer course of sheets join-g the curb shall be composed of No. five (5) B. W. G., weighing eight and $\frac{85}{100}$ to the square foot. These sheets shall be two (2) feet long and butted together with butt strips two and one-fourth by one-fourth ($2\frac{1}{4} \times \frac{1}{4}$) inches, to lie flat on the curb and riveted to the curb with three-eighth ($\frac{3}{8}$) inch rivets spaced one and one-fourth ($1\frac{1}{4}$) inches apart, centre to centre, and to each other with same rivets spaced one and one-fourth ($1\frac{1}{4}$) incres, centre centre. Counting the curb sheet No. eight (8), the next ad-
139 joining, No: seven (7), to be composed of No. nine (9) B. W. G., weighing five and $\frac{93}{100}$ lbs. to the square foot; Nos. 6, 5, 4, 3, 2 to be composed of No. twelve (12) B. W. G., weighing four & $\frac{87}{100}$ lbs. to the square foot; No. one (1), or the sheet connected to centre crown sheet, to be composed of No. ten (10) B. W. G., weighing five $\frac{37}{100}$ lbs to the square foot; the crown sheet to be fifty-two (52) inches in diameter, composed of iron one-fourth ($\frac{1}{4}$) inch thick, weighing ten (10) lbs. to the square foot. The rivets in sheets other than Nos. one (1) and eight (8) shall be one-fourth ($\frac{1}{4}$) inch in diameter, flat head, and driven on the outside.

Top guide-wheels.

There shall be place- on top of this section, opposite the eight (8) guide-rails, eight (8) guide-wheels and brackets to hold the section in proper position. They shall be of cast-iron, grooved in their edges to work freely on the guide-rail of column. These wheels are to be secured in suitable cast-iron frames by a one (1) inch turned wrought-iron pin; the frames to stand on eight (8) cast-iron bed-plates, which shall be secured to the top angle iron, and with bolts passing down through the crown sheets and the flanges of the diagonal brackets. The bed-plates shall be cast with a flange on outside three-fourths ($\frac{3}{4}$) inch to pass down over outer edge of
140 holder, one (1) flange on each side and two (2) tee slots on top to receive the heads of the bolts securing the frame.

Man-holes.

There shall be two man-holes 20 x 18 inches, with covers composed of $\frac{3}{8}$ boiler iron, secured to a ring of $2\frac{1}{2}$ x $\frac{1}{2}$ inch flat iron with $\frac{5}{8}$ top bolts, and provided with one (1) inch vent-plug.

Chain-wheels.

There shall be two chain-wheels supported or fastened on the main rafters of building; these rafters to be reinforced with boiler-plate shoes. (See drawing). The hub of wheel to be bored to receive a pin one and three-fourth ($1\frac{3}{4}$) inches diameter; the arms, rim, hubs, and pin to be of sufficient section of metal as will carry a load of five thousand pounds (5,000 lbs.).

Counter-balances.

The counter-balances to be composed of two (2) bars of three-fourth ($\frac{3}{4}$) inch square iron about twenty-one (21) feet and six (6) inches long, the upper ends to be formed in an eye to receive one (1) inch bolts; the lower end into a jaw to be secured to a plate of wrought iron one-half ($\frac{1}{2}$) inch thick, eight inches long, four (4) inches wide on each end, and six (6) inches wide in the middle, to be secured to the side of cup of outer section by four five-
141 eighths ($\frac{5}{8}$) inch bolts; the upper ends to be secured to a gallows-frame of two (2) plates of bar-iron each ($\frac{3}{8}$) three-eighth-inch thick; the centre of the frame to be provided with a seven-eighths ($\frac{7}{8}$) inch turn-buckle and attached to a five-eighths ($\frac{5}{8}$) inch proof chain; the chain to be about thirty (30) feet long, to pass over the chain pulleys and down into a recess in hollow pilaster in wall, carrying a rod of iron one and one-fourth ($1\frac{1}{4}$) inches in diameter and about six (6) feet long.

Counter-weights.

The counter-weights to be made of cast-iron, about twenty inches (20) diameter, and their aggregate to be sufficient to cause the holder to give a pressure of four (4) inches when both section- are at their full working height.

Tank-guides.

There shall be sixteen (16) tank-guides or wall-plates, eight (8) to be compose- of six (6) by one and one-eighth ($1\frac{1}{8}$) ($6 \times 1\frac{1}{8}$) channel iron, weighing about ten (10) pounds to the lineal foot, and eight (8) to be composed of eight (8) by one-half ($\frac{1}{2}$) inch cast-iron plates, each twenty (20) feet long and secured to wall of tank by eight (8) three-fourths ($\frac{3}{4}$) inch expansion bolts six (6) inches long.

Tank connections.

142 To consist of one (1) ten (10) inch drip-pot, one (1) ten (10) inch tee, one (1) ten (10) inch elbow, with shoe; sixty (60) lineal feet ten (10) inch cast-iron pipe, and one (1) ten (10) inch plug; also one (1) twelve (12) inch drip-pot, one (1) twelve (12) inch tee, one (1) twelve (12) inch elbow, with shoe; sixty (60) lineal feet of twelve (12) inch cast-iron pipe, and one (1) twelve (12) inch plug.

Sundries.

All the sheets to be used in the holder must be of annealed iron and straightened true and level, and be perfectly free from buckles, all the material used to be the very best of their respective kinds, and the workmanship must be first-class in every respect. The work must all be properly fitted in the shop before erection, and receive for the sheet iron one coat of (paint) oxide-of-iron paint and boiled linseed oil. When the work is finished it shall all have one coat of oxide-of-iron paint and boiled linseed oil.

When the holder is complete it shall be round and true, work smoothly, and be perfectly gas-tight.

The holder columns, girders, &c., are to be finished and erected complete, in accordance with the spirit of these specifications and as set forth by the accompanying drawing.

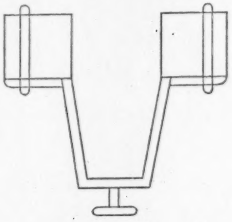
143 *Specifications for Tank.*

To be constructed as follows:

Inside diameter to be seventy-four (74) feet; the thickness of brick wall to be thirteen (13) inches all round. This ring of brick-work is to be laid two (2) inches from the stone-work. Behind the brick and between the stone work there shall be a space left of two (2) inches wide. This space is to be filled with cement mortar, made of one part hydraulic cement and one part of clean, sharp sand. This mortar is to be of a consistancy so that it can be pounded in.

The best way to build a tank of this description is to lay the stone-work first. This can all be layed with common mortar. You will notice on plan that there are sixteen (16) foundation piers. These piers are carried out far enough so as to make the foundations for the building around the holder. You will notice that when these piers are built as high as the tank-wall there are substituted or erected on each alternate one two (2) timbers ten by ten (10 x 10) inches and about forty (40) feet long. These are carried up to top

of walls of building. The main rafters are framed into these timbers, leaving a space of two (2) feet between them and forming a hollow pilaster. These hollow pilasters receive the counter-
144 weights of holder. On each one of these ten by ten (10 x 10) inch timbers there are bolted wrought-iron brackets—thus:



These brackets are made of three and one-half ($3\frac{1}{2}$) by three-fourths ($\frac{3}{4}$) ($3\frac{1}{2}$ x $\frac{3}{4}$) inches flat-iron, and made fast to the ten by ten (10 x 10) pieces. This is strong, forming a regular truss. On this tee-rail the guide-wheels of holder is run, forming the purpose of a column, and at the top and on the main rafters are placed boiler-plate shoes. Through these shoes there goes one and one-fourth ($1\frac{1}{4}$) inch rod or bolts to carry the chain-pulleys for the counter-balance weights.

Buildings.

The building will have sixteen (16) sides and sixteen pilasters. Eight (8) of these will be used for the counter-weights and will be built hollow; the other eight (8) will be made solid—one timber ten by ten (10 x 10) inches. This building will be supported entirely by wooden columns built inside the brick-work and filled in by an eight (8) inch wall.

145 The best way to build a tank of this description is to leave the brick lining until the last; then you can take all the care in getting the wall plumb and round and the proper filling of the two (2) inch space with cement. At the top of [the] main rafters, and directly under the cupula, there will be placed a wooden ring twelve (12) feet in diameter and about fourteen (14) inches square, built of three (3) inch plank. On this ring all the rafters are bolted at their upper ends. The lower ends of main rafters will be framed into the upright timbers.

The roof will be covered with one (1) inch common board, all fastened to the purloins. On these boards will be fastened the slate. In the centre of [the] building, and about seven (7) feet above the top of the wall, will be a wrought angle iron ring about twelve (12) feet in diameter, made out of four by four by one-half (4 x 4 x $\frac{1}{2}$) inch angle iron. Into this ring will be run all the tie-rods for supporting the rafters, forming a truss for the support of the entire roof.

Endorsed on cover: Minnesota C. C. U. S. No. 297. The Minneapolis Gas Light Company, appellant, *vs.* The Kerr Murray Manufacturing Company. Filed 15th September, 1884.

122-300

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 297.

THE MINNEAPOLIS GAS LIGHT COMPANY, APPELLANT.

vs.

THE KERR MURRAY MANUFACTURING COMPANY, APPELLEE.

Assignment of Errors and Brief for Appellant.

P. M. BABCOCK, AND
ANSON B. JACKSON,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

THE MINNEAPOLIS GAS LIGHT COMPANY, APPELLANT,

vs.

THE KERR MURRAY MANUFACTURING COMPANY, APPELLEE.

STATEMENT OF CASE.

Appellee, a corporation organized under the laws of the State of Indiana, brought its suit in equity against Appellant, a corporation organized under the laws of the State of Minnesota, in the Circuit Court for the District of Minnesota, to recover judgment in the sum of $5,415.57, with interest, for an alleged balance due by reason of the construction of a telescopic gas holder for Appellant at the City of Minneapolis, Minnesota, and to have such judgment decreed to be a lien under the Minnesota Mechanics' Lien law, upon certain property belonging to Appellant, upon which such gas holder is situated.

The bill avers that on or about the 19th day of February, 1881, at the instance and request of Appellant, Appellee erected and constructed for Appellant one telescopic gas holder at the City of Minneapolis, Minnesota, at the agreed price of $9,070; that said gas holder was in all things manufactured, put up, and erected in a good, substantial and workmanlike manner, and was reasonably worth said sum of $9,070; that Appellant has paid on account of the construction of said gas holder the sum of $3,792.74 and no more.

The answer of Appellant admits that the contract price of the gas holder was the sum of $9,070; denies that said gas holder was worth the sum of $9,070, and avers that the same was of no greater value than $4,070; avers that Appellant has paid on account of said gas holder in cash, the sum of $4,953.84, and delivered to Appellee coke on account thereof of the value of $1,440.46; avers that said gas holder was erected and constructed under an express contract, by the terms of which said gas holder was to be constructed in exact accordance with certain plans and specifications, which form a part of said contract; avers that said gas holder was not constructed according to said contract or to said plans and specifications or in a good and workmanlike manner, by reason whereof the same has never been fit for the purpose for which it was built; has never worked in the manner contemplated by said contract, and has always been an imperfect holder; and that the difference in value between said holder as constructed and what it would have been worth if constructed in accordance with said contract is the sum of $5,000; and that by the terms of said contract it was expressly agreed that Appellee should have the iron and other material necessary to build, construct, and fully complete said holder, in the City of Minneapolis, within sixty days after being notified by Appellant to produce the same and to fully complete said gas holder on or before the 15th day of November, 1880; that Appellant notified Appellee on or about July 1st, 1880, that it was ready for Appellee to ship said material; that Appellant at great cost erected and fully completed the tank and building in which said gas holder was to be placed on the 1st day of September, 1880, so far as Appellant had agreed to construct the same; but that

Appellee did not ship to and produce said material at the City of Minneapolis until the winter of 1880 and 1881, and did not pretend to complete such gas holder until Feb. 19th, 1881; and that Appellant never consented to or waived the breach of the contract as above alleged; avers that between the 15th day of November, 1880, and the 19th day of February, 1881, Appellant was engaged in manufacturing, furnishing and selling gas in the City of Minneapolis, and that had the Appellee constructed and completed said gas holder on or before the 15th day of November, 1880, Appellant would have made a profit upon the gas it could and would have manufactured, furnished and sold between said 15th day of November, 1880, and February 19th, 1881, amounting to $6,757.89; and that by reason of Appellee's not completing said gas holder within the time specified in the contract, Appellant was deprived of such profit and thereby directly damaged in said sum of $6,757.89 and demands judgment in the sum of $9,082.19 with interest, since February 19th, 1881.

The *replication* denies all the averments in the answer.

The Circuit Court found that on May 28th, 1880, Appellee concluded a verbal contract with Appellant for the construction of a gas holder according to the written specifications referred to in Appellant's answer; that Appellant was to notify Appellee when to purchase the sheet iron to be used in manufacturing the holder, and Appellant was to have the benefit of any fluctuation in the price of the iron between the date of the contract and the day when such notice was given; that no time was fixed when the gas holder should be completed ready for use; that it was completed and accepted February 19th, 1881; that the gas holder was not constructed of the material required by the specifications and does not fulfil in every respect the requirements of the contract; that Appellant did not agree to furnish the scaffolding used in the construction of the gas holder; that the iron used in the construction of the holder was not such as required by the specifications and that the difference in price between that furnished and required is three-fourths (¾) of a cent per pound; that Appellee did not furnish guide rails and braces as required by the contract, which are worth $50 and has not paid for stoves it used during the construction of the holder which were purchased by Appellant at the price of $61.30; that it would require the expenditure of $10 to properly adjust the holder; that Appellant has paid on account of construction $3,792.74 to which Appellee concedes an additional credit of $894 making the following summary:

Contract price of holder		$9,070 00
Payments	$3,792 74	
Conceded credits	894 00	
Further allowances	796 30	5,483 04
		$ 3,586 96

For which sum with interest since February 19th, 1881, with costs, a decree was ordered in favor of Appellee, and pursuant to such order on the 18th day of October, 1883, a decree was duly entered therein for the amount found due Appellee, by which decree said judgment was made a specific lien upon such gas holder and the premises upon which it is situated; from which decree Appellant duly appealed to this Court.

To a proper understanding of the issues as presented on this appeal it may be useful to give here some pertinent sections of the Minnesota Statute under which the complainant claimed the right of lien sought to be enforced in this action.

The lien relied on in the Bill depended upon General Statutes of Minnesota, Chap. 90, Sections 1 and 7, which confer a right of lien on any party furnishing labor, materials or machinery for erecting any mill, manufactory or other building, provided the lien claimant shall within one year from the time of furnishing such labor, material or machinery, make an account in writing of the items thereof, under oath, and file the same in the office of the Register of Deeds of the proper county.

Then follows Section 8. "*Judgment on lien, how obtained and enforced.* "Any person holding a lien under the provisions of the preceding sec- "tions may proceed to obtain judgment, and enforce the same, in the "same manner as in actions for the foreclosing of mortgages upon real "estate."

Chapter 81, Section 27 provides: "Actions for the foreclosure of "mortgages, shall be governed by the same rules and provisions of "statute as civil actions, except as herein otherwise expressly pre- "scribed." No special provision being made in this chapter with regard to pleadings in such actions, reference must be had to Chapter 66, the general Practice Act of the State, which contains the following provisions:

Section 1. "The distinction between actions at law and suits in "equity, and the forms of all such actions and suits are abolished; and "there shall be in this State but one form of action, for the enforce- "ment or protection of private rights, and the redress of private wrongs; "which shall be called a civil action."

Section 88. "The forms of proceedings in civil actions, and the rules "by which the sufficiency of pleadings is to be determined shall be "regulated by statute."

Section 89. "The only pleadings on the part of the plaintiff are: "First: The complaint. Second: The demurrer or reply. And on "the part of the defendant, First: Demurrer. Second: The answer."

Section 96. "The answer of the defendant shall contain: First. A "denial of each allegation of the complaint controverted by the defen- "dant, or of any knowledge or information thereof sufficient to form a "belief."

"Second. A statement of any new matter constituting a defense or "counterclaim, in ordinary and concise language, without repetition."

"Third. All equities existing at the time of the commencement of "any action, in favor of a defendant therein, or discovered to exist "after such commencement, or intervening before a final decision in "such action. And if the same are admitted by the plaintiff, or the "issue thereon is determined in favor of the defendant, he shall be en- "titled to such relief, equitable or otherwise, as the nature of the case "demands, by judgment or otherwise."

Section 97. "The counterclaim mentioned in the last section must "be an existing one in favor of a defendant, and against a plaintiff, be- "tween whom a several judgment might be had in the action, and aris- "ing out of one of the following causes of action:

"First. A cause of action arising out of the contract or transaction "set forth in the complaint as the foundation of the plaintiff's claim, "or connected with the subject of the action.

"Second. In an action arising on contract; any other cause of action "arising also on contract, and existing at the commencement of the "action."

Section 98. "The defendant may set forth, by answer, as many "defenses and counter-claims as he has, etc."

It will thus be seen that the right of the respondent in the court below to set up by its answer the claims which were there disallowed (erroneously, as we think), was an inherent incident of the complainant's claim of lien. The Statute on which the complainant relied as conferring the lien also prescribed the remedy or means of enforcing it, and provided as an incident to this remedy that the defendant might, in the same action, set up all defenses, equities, or counter-claims, and have affirmative judgment in its favor for the amount of such equities as it might establish.

Koempel vs. Shaw, 13 Minn., 488.
Partridge vs. Ins. Co., 15 Wallace, 573.
Hilton vs. Dickinson, 108 U. S., 175.
Ryan vs. Bindley, 1 Wallace, 66.
Stinson vs. Douson, 20 How., 461.

ASSIGNMENT OF ERRORS.

I.

The Circuit Court erred in finding that by the terms of the contract under which the gas holder was constructed, no time was fixed for its completion.

II.

The Circuit Court erred in finding that the holder was accepted about February 19th, 1881.

III.

The Circuit Court erred in not allowing Appellant for the profit it would have made on the manufacture and sale of gas between November 15th, 1880, and February 19th, 1881, amounting to the sum of $6,757.89.

IV.

The Circuit Court erred in finding that the difference in value between the gas holder as constructed and its value if it had been constructed according to the contract was only $675.00, or ¾ of a cent p[er] pound on the quantity of iron used.

POINTS AND AUTHORITIES.

I.

The first assignment of error suggests the inquiry as to whether by the terms of the contract under which the gas holder was constructed it was agreed that the gas holder was to be fully completed on or before the 15th day of November, 1880.

In order to determine correctly this question it will be necessary to review the situation and acts of the parties throughout the negotiations, by correspondence and otherwise, for the making of this contract, and the admissions of the parties, as to the tenor of the contract, found in their subsequent correspondence in relation to its performance.

It appears that on April 3d, 1880 (Exhibit 3, page 52 of record), Kerr Murray wrote Appellant proposing to construct the gas holder for $9,070. April 11th Appellant replied to such proposition (Exhibit 12, page 53 of record):

"Your plans and specifications received. I am in a muddle about "them and don't know what to do. *We want the holder ready for use* "*November 1st*," and proposed that the iron be purchased September 1st.

April 14th Kerr Murray replied to Appellant's letter (Exhibit 5, page 54 of record), "*The 15th day of September is too long ahead, as it will be* "*necessary to purchase that iron in May, so as to have everything in Minne-* "*apolis by the time you have the tank and building done.*"

April 16th Appellant replied to this last letter (Exhibit 4, page 54 of record), "I think the iron should not be bought before July at least; "*of course it must be bought in time to complete the work.*"

May 3d Kerr Murray (by Cressler) replied to this letter (Exhibit 6, page 55 of record), "I have heard Mr. Murray speak of the cheapness "of stone in your locality in comparison to brick, and it might be "cheaper to build the entire building with stone. * * * *You can* "*commence on that at once*, and, as Mr. Murray's health will permit, he "will come and see you, and, in the event of his not being able to do so "soon, the writer will come and see you, and have no doubt that every-"thing can be arranged satisfactorily." * * * "If you desire we "can make the drip boxes, ells, tees, tank plates, etc., at once, and send "them, *so you will have nothing to delay you on the tank.*"

May 28th, 1880, A. D. Cressler, secretary of Appellee, visited Minneapolis for the purpose of closing the contract with appellant for the construction of the gas holder (deposition of Mr. Cressler, page 22, folios 64 and 65 of record.) He testifies (folio 65, page 23 of record): "He [Brown, superintendent of Appellant,] informed me that the brick "contractors had formed a pool on brick, and he did not know how soon "he would be able to get them, as he would not pay their price, as he "had all winter to build the holder in; he had plenty of coke to keep "the men warm. There was nothing said at that time when the holder "was to be completed, as he had plenty of time. At that time Mr. "Brown gave me the contract for building the holder, with the excep-"tion that he was to notify me when to purchase the iron. There was "no time fixed within which it was to be completed in awarding the "contract to the plaintiff."

On cross examination Mr. Cressler said: "When I went to Minne-"apolis [May 28, 1880], *I had seen the letter from the defendant dated* "*April 11, 1880*, but did not know at that time that the defendant "wanted the holder ready for use November 1, 1880. (Folio 67, page 24.

Mr. Brown, superintendent of Appellant, testifies (folios 76 and 77, pages 31 and 32 of record); "After negotiating with Kerr Murray, as "shown by the correspondence in evidence, Mr. Cressler came to Minne-"apolis to complete the contract for the work in question. * * * I "asked him if he was prepared to take up the negotiations as con-"ducted with Kerr Murray before his death and carry them out. He "said he was; that he came there for that purpose. I told him at that "time that we should award the contract to him, providing we could "agree as to the time the holder was to be constructed. * * * He "said that all he wanted was four months to complete the holder from "the time that we ordered him to go ahead—that is to say, he wanted "sixty days to get the iron, and get it on the ground at Minneapolis "and sixty days' further time to fully complete the work. I told him "that our necessities were such that we must have a holder by the 1st "of November, 1880, or in the early fall. He said that, of course, would "depend upon the time when he got the order to go ahead—that he "could do it safely in four months from the time he got the order to do "it, and that he could not do it sooner. * * * Nothing was said in "the conversation with Mr. Cressler or any one else about the plaintiff's "having all the following winter to complete the construction of the "holder. I never assented to any terms as to time when the construc-"tion was to be completed or any modifications different from before "narrated here."

William W. Rand, a witness on the part of Appellant (folio 85, page 37 of record) testified:

"I heard a conversation between H. W. Brown and A. D. Cressler "about the 28th day of May, 1880, respecting the construction of the "gas holder by the plaintiff for the defendant. This conversation was "had in the condensing room at the works of the defendant in this city "(Minneapolis.) They were talking about building the holder and Mr. "Cressler said the holder was to be completed within four months after "the iron was contracted for—that is to say, the holder was to be ready "for gas four months after the iron was contracted for. * * * Mr. "Cressler said that he would have the iron on the ground within sixty "days after Mr. Brown ordered him to buy." (Folio 86.)

On cross-examination (folio 87, page 39 of record) this witness further testified:

"The conversation between Mr. Brown and Mr. Cressler about which "I have testified took place some time in May. I was in the condens-"ing room when it occurred; no one called upon me to take part in "the conversation. I stood near by and heard it. I did not take any "part in making the contract. * * * The contract was concluded "before they left the condensing room. * * * I heard all the con-"versation that took place between Mr. Brown and Mr. Cressler in the "condensing room. Mr. Cressler agreed to have the holder completed "ready for gas four months after Mr. Brown ordered the iron of Mr. "Cressler for the work."

The foregoing constitutes all the oral testimony respecting the question as to whether the holder was to be completed within a specified time, except the evidence of subsequent admissions, made by Mr. Cressler. (See folio 94.)

June 21st Appellant wrote (Exhibit 8, page 55 of record): "We have the excavation for the tank nearly done and expect "to have the building complete for iron-workers by the 15th of Sep- "tember, if not by the 1st of September. *We shall try and have the "holder ready for use by November 15th, if not November 1st. Don't contract "for work that will interfere with the above.*"

June 28th Appellant again wrote Appellee (Exhibit 9, page 56 of record): "How are you fixed for work? Can you have the holder "done, ready for use, by November 1st? We find we cannot get along "without it, and must have it then. Tank and building will be done "September 15th. Write me about it by return mail."

June 30th Appellee replied to both of the above letters (Exhibit 10, page 56, of record), saying: "I arrived here to-day and find your "favors of the 21st and 28th inst. As you informed me when in your "city that *you did not expect to be ready for the holder before November or "December* I have made contracts that I am afraid it will be impossible "to ship your holder before the 1st of November at the earliest."

July 1st Appellant wrote (Exhibit 13, page 56 of record): "We wish "you to have material, men, etc., here to commence the work of erecting "our gas holder September 1st, and to have the same completed, ready "for use, not later than November 1st next. * * * We shall have "the tank and building ready for you September 1st."

July 3d Appellant wrote (Exhibit 14, page 57 of record) saying: "I note what you say about delay in the holder. We find our con- "sumption so large that we cannot get through with what we have, and "must have the work here by September 15th, *or in other words we must "have holder done and ready for use November 15th, and not a day later.* "Our necessities are urgent and we cannot be delayed or disappointed. "*If you cannot reach those dates and surely so without fail, telegraph us "on receipt of this* and I will take the next train for Philadelphia "and close with Daily & Fowler, as a holder we must have or let the "town out of light. Figure carefully, Cressler, and make no mis- "take; do it if you can and if you can don't fail on us if you have to "disappoint everybody else. * * * *Wire me what you can and "will do on receipt of this.*" "P. S.—In ours of July 1st, we named "the date of completion November 1st, but you see in this we stretch it "it to the 15th, which is the last day."

Replying to this letter under date of July 7th (Exhibit 15, page 58 of record) Appellee says: "*The contracts for the iron for your holder "are all made and promised shipped this month. We will do everything in "our power to have your holder shipped by the 15th of September.*"

August 7th Appellant wrote (Exhibit , page 58 of record), saying: "The stone wall is up, the bottom in, and the brick wall "started. * * * *Bear in mind we must not be delayed beyond the agreed "time on this work* no matter if all the gas companies in America are dis- "appointed, as we cannot stand any delays and keep the town in light."

August 12th, Appellant wrote: (Exhibit 17, page 59 of record.) "The tank is ready for you now and I wish you were now

"ready for the tank. We do hope that you will crowd the holder so as "not to be a moment behind hand as our necessities are most urgent."

September 6th Appellant wrote (Exhibit 21, page 59 of record): "I "again urge you to be prompt about the holder. We are not in any "condition to be put off or delayed. Promptness will make us ever- "lasting friends and delays will make unpleasantness all around."

September 8th Appellant wrote (Exhibit 22, page 60): "About the "holder tank, that has been ready some time. It is now entirely "finished and ready for you. * * * We expect you promptly on "the 15th of September."

September 10th Appellee replied to this letter (exhibit 23, page 60), saying: "*We are using every effort possible to get out your work and expect* "*to ship* all balance bench castings to-morrow," etc.

September 18th Appellant wrote (Exhibit 24, page 60): "The tank is "fully completed long ago. Building all done up to the roof. In fact, "the whole thing is done so far as your work would be affected."

September 24th Appellant wrote (Exhibit 26, page 61): "One week "ago I wrote you asking about the progress you were making and "when we could expect shipment of holder, but we get no reply. I "hate to think you are trifling with us, and trust you are not. *You* "*know you well understood our necessities when we ordered the work.* The "time has passed when the work was to be commenced, and, if equal "delays occur in the completion, we might as well face the fact that we "cannot supply our city first as last. In short, gents, we will not sub- "mit to be trifled with, and you must calculate not to do so."

September 25th the Appellee wrote (Exhibit 25, page 61), saying that it would ship the holder the following week.

October 15th the Appellant again wrote (Exhibit 27, page 61):

MINNEAPOLIS, Minn., October 15th, 1880.

Kerr Murray Mfg. Co.:

GENTS—If you were here and in my position I know you would not feel kindly at the way we are ignored and delayed in our work. My last information from you was September 25th, in which you promised shipment of the holder, "next week," or over one week ago. *Of course I realize we have no right to complain until the expiration of the time for the completion of the work;* but, could it be possible to do so, I would pay largely for the use of the holder at this moment. We are sending out over three times the full of our holders every night, and still it is increasing, and what in the world am I to do beats me. We must have that holder and no mistake; and, gentlemen, you must not disappoint us; we can't stand it. We are in distress.

Yours truly,

H. W. BROWN,
Superintendent.

To which the Appellee replied October 27th (Exhibit 28, page 62):

FORT WAYNE, Ind., October 27th, 1880.

Minneapolis Gas Light Co.—

GENTLEMEN: The channel iron arrived Saturday; too late to do anything that day; but Monday morning we commenced with a double gang of men on your holder, and will keep them on. We are getting it ready fast—as fast as it would be possible under any circumstances. We can ship a section by Friday of next week sure with every exertion to make it earlier; so our man can go up and commence the erection the following week. We are much in need of money now, and wish you

would send us about two thousand dollars on account. We have already paid for a large portion of the material for the holder, and have two large notes coming due now on account of the same. *We expected to have had the material all in your works and partially erected* before asking you to advance for the material, but the expectation formed when we made our settlements has not been realized, solely on account of delay of channels, for which we certainly are not to blame, as we used every possible means and expense to get them. *As it is we will get the holder up before contract time,* and just as fast now as a holder can possibly be rushed.

Yours truly,

KERR MURRAY MFG. CO.

October 29th the Appellant replied with (Exhibit 3, page 63):

MINNEAPOLIS, Minn., October 29th, 1880.

K. Murray Manufacturing Co.—

GENTS: Your favor of the 29th received and contents noted. You may draw on us at thirty days' sight for $2000.00, which we will accept and pay. We *are rejoiced to know that you expect to get the holder up at the time contracted for,* and truly hope you will succeed. Surely we need it badly enough. I can only say, don't waste a moment until it is done.

Yours truly,

H. W. BROWN,

Superintendent.

And November 3d, 8th, and 15th (Exhibits 30, 31, and 32, page 63), all urging the Appellee to observe the obligation of its contract and push the work with all possible speed.

The rest of the correspondence consists of constant urging and suggestions of means for hastening the work, on Appellant's part, and excuses, promises, and *requests for money* on the part of the Appellee, until the letters of January 4th and 8th (Exhibit 46, page 67, and Exhibit 4, page 68), in which the Appellant specifically declined to accept the work as a performance of the contract, but proposed to have it completed as rapidly as possible, to be settled for as they might be able to agree, *reserving all rights for non-compliance in time and as to the quality and character of the work.*

The evidence on the question as to whether there was a time limit in the contract may be summarized as follows :

The first letter of the Gas Company, answering Mr. Murray's proposition to build the holder said: "We want the holder ready for use November 1st." Each subsequent letter, on either side of the correspondence, contains some expression, more or less direct and emphatic, showing a clear comprehension of the importance of being prompt and avoiding delays, in order that the work might be completed within "*contract time.*" Mr. Brown and Mr. Rand, each testified that in the conversation in May, the date of completion was distinctly agreed upon for November 1st, or the early fall.

Against this Mr. Cressler testifies that no time was mentioned as the date of completion. That *nothing was said on the subject except that Mr. Brown told him he could take all winter*—yet in the following month (June 30th) Cressler writes: "*As you informed me when in your city,* that "you did not expect to be ready for the holder before November or De- "cember, etc., etc.' This witness also admits that before going to

Minneapolis, *he had read the letter of April 11th* (fixing November 1st as the date of completion) but did not know that the Gas Company wanted the holder in November!

In answer to each urgent letter from the Gas Company, throughout the Summer and Fall, Mr. Cressler replies *we will get it done within contract time.* Afterwards however, having deliberately neglected the work and utterly ignored the agreement and his subsequent frequent promises, he comes forward—in the face of his own repeated admissions and the unimpeached testimony of Mr. Brown and Mr. Rand and the strong corroborative evidence of all the correspondence, and says he *never heard of any contract time at all!!*

The preponderance of evidence is overwhelmingly against Mr. Cressler's later recollection on this point. If no time had been fixed for the completion of the work, the *natural*, as well as the fair and honorable course would have been to answer the Appellant's urgent letters frankly, that in-as-much as the Appellee was under no obligation to finish the job during the Fall, it proposed to complete other more profitable contracts first, and take hold of this one later, at its convenience. Such an announcement would have raised the present issue fairly and squarely at a time when the Appellant might have avoided the injurious consequences of relying on the Appellee's performance of the obligation which it now seeks to repudiate. But the correspondence nowhere hints at any claim of right on the Appellee's part to ignore the time limit, which the Appellant was constantly reminding it of.

On the other hand, by constant acquiesence and repeated express promises, it fully recognized "the contract time" as an essential element of the agreement and one which it intended to live up to.

Aside from the positive and preponderating evidence on this point, the Appellee's course throughout the Summer should constitute an equitable estoppel to prevent its being heard now to dispute this important provision of the contract.

If any doubt could be entertained that the time of performance, and the necessity and importance to the Appellant of full performance within that time, were clearly and distinctly understood and agreed upon by both parties at the personal interview of May 28th, what shall be said of the letter of July 3d (Exhibit 14) and the reply (Exhibit 15)? These letters, independent of all previous testimony, had, we contend, the legal effect of incorporating in the contract from that time forward, by mutual consent, the stipulation that the work should be completed by November 15th.

The conclusion that no time was agreed upon for performance can only be sustained by repudiating the positive testimony of two credible witnesses, closing our eyes to the situation and correspondence of the parties, and adopting Mr. Cressler's unsupported testimony as a sufficient avoidance of his own earlier letters, admissions and conduct, at a time when the subject was fresh in his mind.

II.

The second assignment of error is based on the expression of the trial court that the holder was completed and *accepted* about February 19, 1881. (Folio 37 page 12.)

We think it sufficiently apparent from some of the other findings that the learned trial Judge did not intend this as a finding that the holder was accepted by the Appellant, in the legal sense, so as to constitute a waiver of performance in strict compliance with the contract. Such a finding would have been inconsistent with the language immediately following: "It is not constructed of the material required by the speci-"fications and does not fulfill in every respect the requirements of the "contract."

The Court then proceeds to make certain allowances to Appellant for confessed violations of the contract on Appellee's part, which would, of course, have been inadmissable after an acceptance and waiver in the ordinary sense; but, in order that the point may be fully reserved, the Appellant has thought proper to make this assignment of error and calls attention of this Court to the correspondence from October 15th forward (found on pages 62 to 69 of the record), which sufficiently rebuts any idea of acceptance or waiver in permitting the work to be completed after the contract time.

Barber vs. Rose, 5 Hill, 76.

On appeal from the decrees of the Circuit Courts, in equity, the facts as well as the law are before this court.

The San Pedro, 2 Wheat., 132.
Hunt vs. Oliver, 118 U. S., 211.

III.

If this Court shall conclude from the evidence that the parties had agreed on November 15th as the time for the completion of the holder, the question then arises as to the proper rule of damages for the complainant's delay until February 19th, 1881.

It may be observed that the cause of delay, as plainly shown by all the evidence and correspondence, was simply the willful and deliberate neglect of the complainant, in order to complete other more profitable jobs, contracted for after this work was undertaken.

Exhibit 10, p. 56.
Exhibit 25, p. 61.
Exhibit 36, p. 64.
Exhibit 38, p. 65.
Folio 78, p. 32.

The purpose for which this holder was ordered, the situation of the Appellant in regard to the need for it, and the general effect on the Appellant's business, which would naturally and necessarily follow any delay in its completion, were all fairly within the knowledge and contemplation of the Appellee.

Mr. Cressler visited the ground in May, saw just what the Appellant's apparatus and capacity consisted of, knew where this holder was to be located, and that it was to stand on the site of one of the two small holders, which constituted at that time all the holder capacity of Appellant's gas-works, so that one of the holders then in use had to be taken down to make room for it. (Folio 83.)

The business of Appellee was the manufacture of just this sort of machinery, and it must be presumed to have known the purposes to which it would ordinarily be applied, and that Appellant bought it for the usual purposes of that business, and to fill the usual requirements, viz:, to add to the earning capacity of its gas-works in the manner pointed out by the evidence.

The earning of greater profits by the increased storage and pressure capacity and the consequent increase of sale and consumption of gas was the exact purpose and the only purpose which either party could have had in mind as the reason for this contract.

That a gas company having the exclusive sale of gas in the City of Minneapolis would naturally have a much larger demand to supply during the winter months than at any other season was a self-evident proposition, but peculiarly so to the Appellee, whose business made it familiar with the details of this traffic.

The precise *amount* of daily loss which the delay would cost the Appellant may or may not have been estimated by the Appellee in advance before determining to put this contract aside until the completion of other work. But the exact *nature* of the loss which it would thus inflict must necessarily have been understood by it.

The Appellant showed, in a manner thoroughly scientific and exact, the precise amount of profits actually lost by the delay. In the nature of the case no estimate of the *real loss* could have been made upon any other rule or principle which would at all compare for certainty and accuracy with the mathematical and mechanical demonstration offered by this evidence;—if, indeed, any other mode of computing it could be devised at all.

Given a fixed number of pipes of given dimensions for conducting the illuminating fluid from a holder of ample storage capacity to a given number of consumers, who desire and are ready to pay for all the gas which the standard pressure can supply during certain hours, and it becomes a mere matter of mathematics to ascertain the precise number of thousand feet which would be thus supplied and sold. It is equally a matter of arithmetic to ascertain the number of feet supplied through the same pipes, with one-half or one-third the proper pressure. And the difference multiplied by the net profit per thousand feet gives the precise amount lost by the loss of pressure and storage capacity.

It cannot be disputed that mechanics and mathematicians would resort to this as the correct and only method of ascertaining the exact difference between the quantity of the gas supplied under the respective conditions of a sufficient holder, with standard pressure, and an insufficient holder capacity and diminished pressure.

These were the damages which followed "naturally—that is, in the ordinary course of things," from the complainant's wanton breach of the obligation which it had voluntarily entered into.

This method of computing the damage sustained seems as consonant with the best considered legal decisions as it is with the considerations of mechanical science and common sense.

Ward vs. Smith, *11 Price*, 19
Robinson vs. Harman, 1 *Exch.*, 855.
Hadley vs. Baxendale, 9 *Exch.*, 341.
Masterson vs. Mayor of Brooklyn, 7 *Hill*, 61.
Booth vs. Spuyten Duyvil Rolling-Mill Co., 60 *N. Y.*, 487.
U. S. vs. Speed, 8 *Wall.*, 77.
Philadelphia Ry. Co. vs. Howard, 13 *How.*, 307.
R. R. Co. vs. Smith, 21 *Wall.*, 255.
Paine vs. Sherwood, 21 *Minn.*, 225.

IV.

The Circuit Court found from the evidence that the holder was not constructed of annealed iron, as contracted for, and that it varied from the specifications in several less important respects. This finding was not only amply supported by the evidence, but as we understand the rule it is conclusive on the Appellee, and cannot be questioned by it in this court except by cross-appeal.

Chittenden vs. Brewster, 2 *Wall*, 191.
Mail Co. vs. Flanders, 12 *Wall*, 130.
The Stephen Morgan, 94 *U. S.*, 599.
Mount Pleasant vs. Beckwith, 100 *U. S.*, *p.* 525.

But independent of this rule of practice, the fact is established in a thoroughly satisfactory manner by the evidence in the case that the material furnished was not annealed iron, and that the material and workmanship throughout were inferior, and the whole job just the sort of a failure that would naturally result from the negligent, slipshod and hasty manner in which it was finally completed.

We think the Circuit Court applied an erroneous rule of damage on this state of facts. It allowed the Appellant the difference of cost between annealed iron and the iron furnished, viz: three-fourths (¾) of a cent per pound on the 90,000 pounds used, amounting to $675.00. The evidence of all the witnesses on this point was that annealed iron was, for many mechanical reasons *the only suitable iron for a gas holder*, and Mr. Rand and Mr. Brown, who were both shown to be experts of wide experience on this subject, fixed the difference in value of the holder as constructed and the value of a holder constructed as called for by the contract at from $4,500 to $5,000.

They explained that unannealed iron is much more liable to crack and split at the many thousand rivet holes and joints which necessarily exist in such a structure, thus constituting a perpetual source of expense both in the leakage of gas and the cost of continual repairs. Some idea of the importance of this consideration may be gained by reference to the specifications on page 70, folio 132, from which it will be observed that

each section required some five hundred sheets, each sheet presenting about fourteen feet of lineal measure on its four edges, and all of these to be riveted together with rivets one inch apart.

Other variations from the contract were pointed out by the witnesses, and were found to exist by the Court, but this is in all respects the most important departure.

To rectify this the Circuit Court allowed the Appellant $675.00, the difference in market price between annealed and unannealed iron of the quantity used.

Few questions have given rise to more frequent and elaborate discussion in courts of law, than the inquiry as to the remedy of a contractor who has failed to perform his contract in all respects.

The earlier conflicts of opinion, or perhaps we may more properly say, the occasionally unsuccessful attempts to apply a uniform rule to the varying facts and circumstances of each case, are happily disposed of by the decision of this court in Dermot vs Jones, 2 Wall, 1.

As applicable to the case at bar we understand the doctrine now to be that where the defendant has not consented to a departure from the contract but yet from the nature of the case he derives some benefit from the work done, the contractor may recover—not on the contract because he has abandoned that,—but on a *quantum meruit* and *quantum valebant* for the work and materials furnished, not exceeding the contract price, (unless the cost of the work or materials has been increased by the fault of the defendant) but against plaintiff's recovery the defendant may recoup the cost of making the structure conform to the contract, or the difference in value between the structure which he gets and the one contracted for.

Dermot vs. Jones, 2 *Wall*, 1, *same case* 23 *How.*, 220.
VanBuren vs. Digges. 11 *How.*, 461.
Smith vs. Brady, 17 *N. Y.*, 173.
Hayward vs. Leonard, 7 *Pick.*, 121.
2 *Smith's leading cases*, p. 34, *et. seq.*, (*note to Cutter vs. Powell.*)

The gas holder was erected on Appellant's premises, within a large and expensive tank and building which Appellant had built to receive it, Appellant having torn down a smaller holder to make room for it.

When once erected it could not be removed without tearing down the cylindrical brick building inside of which it was put together. It was a physical impossiblility for the Appellant to reject the holder altogether or require the Appellee to take it away, and the Appellant's action in resuming possession of its own land and building with this holder inside of it, did not amount to an acceptance or waiver of any of its rights under the contract.

Dermot vs. Jones, 2 *Wall*, 1.
Munro vs. Butt, 8 *Ellis & B.*, 738.
Hunt vs. Wimbledon Local Board, 27 *W. R.* 123.

There is no evidence in the case to suggest that Appellant knew or had any means of knowing that the iron was unannealed until after the job was completed. The difference is not readily discernible from casual inspection, and, when received, the sheets were covered with a thick

an insufficient

coat of paint, so that Appellant might well rely on the contract and the known requirements of the business in that respect.

The principal source of anxiety for the Appellant was the interminable delay, which was costing it several hundred dollars each week, and continually menacing its business and franchise with most serious consequences. When the work was finally completed, the Appellant hastened, in accordance with its legal duty, to stop this source of damage, by filling the holder with gas and putting it in operation without further delay. Then the numerous leaks became evident and only after constant and repeated overhauling, puttying up and repairing leaks and using every effort to make the thing work satisfactorily, did the suspicion dawn upon it, that the Appellee had made use of unannnealed iron for the whole apparatus—which, upon careful testing, was found to be the case.

The case then became as it seems to us, in very close analogy to the case of Dermott vs. Jones (2 Wall, 1) and it is only necessary to apply the rules laid down in that decision to the facts on this record.

The Appellant might perhaps have torn down the holder and replaced the unannealed iron with annealed iron as contracted for, charging Appellee, by way of recoupment, all the cost of such rebuilding in excess of the value of the iron taken out, and also charging Appellee with the additional loss resulting from this new delay.

This would evidently have been a very different matter from the mere $675.00 difference in original cost of the two kinds of iron. It would have involved a new expenditure of practically the whole contract price (without any reference to the delay) and of course the iron taken out would have been worth only a small proportion of its original cost.

Instead of pursuing this impracticable course the Appellant showed by witnesses of wide experience in this particular business, *the difference in value* between this holder as constructed, and a holder constructed of annealed iron in accordance with the contract. The opinions of these witnesses were well analyzed and sifted both on direct and and cross-examination, and were shown to be reasonable and moderate, and the result of their evidence is certainly much more favorable to Appellee than the full measure of recoupment which must have been enforced against it if the Appellant had rebuilt, as it had the right to do.

These witnesses testified, after explaining the difference in practical working between this holder and one of annealed iron, and considering the various sources of expense, leakage, repairs, and inconvenience in operating the unannealed holder, that that the holder was worth from $4500 to $5000 less than it would have been worth if made of annealed iron according to the contract. This was the only evidence on the subject, and we think it entitled Appellant to a recoupment to that amount against whatever claim the Appellee should establish.

Smith vs. Brady, 17 *N. Y.*, *p.* 178.

The measure adopted by the Trial Court was manifestly inadequate as applied to this case, and would be unsafe and extremely difficult of application in many others.

Suppose, for example, that the holder had been made of wood, lead, brass or some other material which might have cost as much as annealed iron, but which would be wholly impracticable for the purpose under any circumstances, the Appellant would be without any remedy whatever.

If by expending $675. the Appellant could have transformed the iron in its holder into annealed iron, or made it as good for the purpose as annealed iron, and so have made the holder all that the contract called for, this would have been the proper allowance to recoup but on the evidence in this case we fail to find any relation whatever—for the purpose of legally ascertaining the defendants damage from this variance,—between the cost of the iron and the value of the holder, *as a holder*.

We respectfully submit that the decree should be reversed with instructions to the Circuit Court to allow the Appellant $4500 for the difference in value between the holder furnished and the one contracted for and, the loss of profits caused by the Appellee's delay ($6757.89) and to enter judgment in favor of Appellant for the difference between these amounts and the decree appealed from.

P. M. BABCOCK,
ANSON B. JACKSON,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 297.

THE MINNEAPOLIS GAS LIGHT COMPANY,
Appellant,

vs.

THE KERR-MURRAY MANUFACTURING COMPANY,
Appellee.

BRIEF FOR APPELLEE.

GEO. C. SQUIRES,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

THE MINNEAPOLIS GAS LIGHT COMPANY, APPELLANT,

vs.

THE KERR MURRAY MANUFACTURING COMPANY, APPELLEE.

BRIEF FOR APPELLEE.

The right of the Appellant to set up its counter-claim to the demand of the Appellee, is not questioned, and we think there is little doubt as to the rule to be applied in this cause. It was well stated in the case of *Hayward vs. Leonard, 7 Pick. 181, (185,)* as follows:—

"We think the weight of modern authority is in favor of the action, and that upon the whole it is conformable to justice, that the party who has the possession and enjoyment of the materials and labor of another, shall be held to pay for them, so as in all events he shall lose nothing by the breach of contract. If the materials are of a nature to be removed and liberty is granted to remove them, and notice to that effect is given, it may be otherwise.

"But take the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used, or profitable rented,—there having been no prohibition to proceed in the work after a deviation from the contract has taken place,—no absolute rejection of the building, with notice to remove it from the ground; it would be a hard case indeed if the builder could recover nothing.

"And yet he certainly ought not to gain by his fault in violating his contract, as he may, if he can recover the actual value; for he may have contracted to build at an under price, or the value of such property may have risen since the contract was entered into.

"The owner is entitled to the benefit of the contract, and therefore he should be held to pay in damages only so much as will make the price good, deducting the loss or damage occasioned by the variation from the contract."

And this court has fully approved of the rule as stated, in *Van Buren vs. Digges, 11 Howard 461.*

This rule has been applied to the case at bar. The claim of the Appellee and the counter-claim of the Appellant, were fully before the lower Court, and upon an examination of all the evidence and full argument, had after the hurry of the term was over, supplemented by written briefs, the decision was made (by Nelson, J.) that the Appellee was entitled, after the allowance of all payments ($3792.74), and conceded credits ($894.00), and the difference in the value of the iron ($675.00), and the amount which it would require to supply some things omitted ($50.00), and the value of some stoves used ($61.30), and the amount necessary to properly adjust the gas holder ($10.00), to the sum of $3586.96, with interest and the costs of the suit.

It is to determine the correctness of this decision, that this appeal has been taken, and the errors claimed by Appellant are set forth in its brief.

I.

The first assignment of error is only important in view of Appellant's position that it sustained certain damages by reason of Appellee's failure to complete the gas-holder by November 15, 1880; for Appellant having elected to keep the holder subject to its alleged claim for damages, (Record, p. 68, Ex. 47,) it is bound to pay its value less any damages it has shown, even if Appellee had conceded that there was a time-limit in the contract.

But we insist that the evidence shows that there was no certain date fixed in the contract for the completion of the work.

The contract in this case was a verbal one, except as to the plans and specifications, which were in writing, so that the decision of this important point depends upon the oral testimony of the parties, aided by the letters in evidence. It appears that prior to the visit of Cressler to Minneapolis, on May 28th, 1880, where the parties were first brought together and the contract was made, some correspondence had passed between them, (Record, pp. 52 to 55.) The first letter is from Murray to Brown, in which the former states that he will build the holder for a certain price ($9970), but nothing is said as to time. Brown replies to this that he don't know what to do, that he wants the holder ready for use November 1st, but that he knows that iron is on the down grade in price, and that he wants to avail himself of the market decline, and he asks if Murray will consent to a clause in the contract, fixing the price for April 1st, (this letter bears date *April 11th,*) but giving the Appellant the benefit of any fluctuation in the price of iron up to September 15th, and also a reduction of $100 in the price, and adds that he must decide then as he has the tank and building to build, and must build them to fit the plans of the party whose holder is bought to fill it. Murray answers this letter on April 14th, and says that he is willing Appellant should have the benefit of the decline in price, but says that September 15th is too long ahead "*as it will be necessary to purchase that iron in May, so as to have everything in Minneapolis by the time you have the tank and building done,*" and, after discussing prices of iron, suggests that he make a contract for May delivery with the price as it will be on the last day of May. Brown then writes, April 16th, that he thinks the iron should not be bought before July at least, that of course it must be in time to complete the work, but that iron must come down within ten per cent of the last year's price, that he is anxious to get it closed as he wants to commence on the tank, and adds, "*I want to take my time about the tank and building, and want to be entirely out of the way when the iron arrives.*" Then follows Cressler's letter of May 3d, enclosing plans of tank and building, and stating that iron is dropping in price every day, so that Appellant will lose nothing by the delay. Mr. Murray died on May 6th. The Appellee Company was then organized, and Cressler went to Minneapolis to see the Appellant and get the contract for the holder. He there met Brown, who informed him that the Appellant would build the tank and building according to Appellee's plans, and then gave Cressler the contract for the holder, but stated that he would inform Appellee when to order the sheet iron, as he desired the benefit of the fluctuations in prices. But no time was fixed for the completion of the contract.

Appellant now tries to make it appear that the contract was that the holder should be completed by November 15th.

Brown testifies that Cressler said, when he was in Minneapolis in May, after he (Brown) had explained that iron was too high, that "all he wanted was four months to complete the holder from the time we ordered him to go ahead, that is to say, he wanted sixty days to get the iron and get it on the ground at Minneapolis, and sixty days further time to fully complete the work. I told him that our necessities were such that we must have a holder by the first of November, 1880, or in the early fall. He said that of course that would depend upon the time when he got the order to go ahead, that he could do it safely in four months from the time he got the order to do it, and that he could not do it sooner. *We then agreed upon a price.*" (Record, p. 31.) And further testifies that the negotiations were had *first at the gas works, and afterwards at the office on Nicollet Ave.* (Record, p. 32.) The only other person who pretends to have heard any of the negotiations is W. W. Rand, the foreman, who testifies, that Cressler said, *in the condensing room at the gas works*, that the holder was to be completed within four months after the iron was contracted for, and afterwards, upon being led up to it by Appellant's attorneys, he exactly coincides with Brown, and states that there was a difference in the price, but that the iron was to be on the ground within sixty days after the order to go ahead. And on cross-examination he testifies that *the contract was concluded between Brown and Cressler before they left the room*, (i. e. at the gas works.) that he heard all the conversation between them, but that he does not remember any other part of it. (Record, pp. 37, 38, 39.)

Opposed to this is Cressler's positive testimony that no time-limit was fixed for the completion, but that the contract for the holder was awarded to him when in Minneapolis, and the price agreed upon subject to such fluctuation in price of sheet iron as might exist when Appellant gave the notification to purchase. (Record, pp. 22 to 26.)

In addition to these positive statements, all the circumstances and the actions of the parties show that no time-limit was fixed *at the time the contract was awarded.* It appears that on Cressler's arrival home he placed the order for this holder on their regular Order Book, (Record, pp. 23, 55,) and gave out the work to the shops, but no mention was made of any time-limit. That about June 15 he went to Cincinnati and Pittsburgh and placed the orders for the sheet iron and shape iron, that the latter was an absolute order, but no time-limit was fixed, and that the former was not absolute, but was placed then to give the Appellee priority when it should direct the iron to be shipped after receiving the notification from Appellant; but no time-limit was fixed when the order was made absolute, the delivery was to be as soon as it could be made. (Record, p. 30.)

All this showed an honest desire on the part of Appellee to expedite the work and to rush it forward to completion when the Appellant should direct the iron to be purchased, but nothing more. And is it probable, if the time for the completion had then been limited and agreed upon, that Appellee would have made the book entries and all these auxiliary contracts without a single reference to the time which the Appellant now claims was a part of the contract? Besides this, the correspondence between the parties after Cressler left Minneapolis sufficiently shows that no time was limited *at the time the contract was made.*

Brown writes on June 21st, asking for a tracing of the holder building, and adds, (Record, pp. 55, 56,) "We shall try to have holder ready for use by November 15th, if not November 1st. Don't contract for work that will interfere with the above;" and again on June 28th, after giving a measurement required for a portion of the holder, he says, (Record, p. 56,) "How are you fixed for work? Can you have the holder done ready for use by November 1st? We find we can't get along without it and must have it then." And yet Appellant had not at that time notified the Appellee to purchase the iron, but now claims that a contract time had been fixed on May 28, and that it was to run from the date of that notification. If the time had been agreed upon why should he make these inquiries?

Cressler replies to these two letters together, on June 30th, he having been absent when they were received, and says, (Record p. 56,) "As you informed me when in your city that you did not expect to be ready for the holder before November or December, I have made contracts that I am afraid it will be impossible to ship your holder before the 1st of November at the earliest. I have two * * holders to complete by October 15th, besides a large number of purifiers, condensers, &c., so we are considerably crowded. We will ship your * * tank work first of next week. The price of iron is the same as when I was in Minneapolis, viz.: two and one-half cents, and they are holding somewhat firmer than several weeks ago. Please inform me by return mail if I shall place the order at once. I will make a strong effort to get the holder shipped by October 15th."

Then follow Brown's letters (Record, pp. 56–57) of July 1st, notifying Appellee to purchase the iron, and of July 3rd, in which he says, referring to Cressler's letter of June 30th, "I note what you say about delay in holder. We find our consumption so large that we cannot get through with what we have, and we must have the work here by September 15th, or in other words, we must have holder done and ready for use November 15th, and not a day later," and asks Appellee to telegraph if they cannot reach these dates, and threatens to go to Philadelphia and close with one of the other bidders in that event. To this Appellee replies by letter of July 7th, (Record, p. 58,) "The contracts for the iron for your holder are all made and promised shipped this month. We will do everything in our power to have your holder shipped by the 15th of September. We are working full force now, night and day."

Now, the court will see that all of the negotiations up to the time of the making of the contract on May 28th, were a haggling on Brown's part about *the price*, he wishing to put off the time as far as possible in order to reduce the price. The price of iron, the card rate, the probable fluctuation, is what is uppermost in the minds of the parties. The time is of minor importance. It was only mentioned once until three weeks after the contract was made, (Record, pp. 53–54,) and when mentioned the reply was that to reach that time the iron should be ordered in May. But having entered into the contract, by which *the price* is arranged to his satisfaction, Brown begins to realize that the city of Minneapolis is growing faster than he had dreamed, and thereupon begins to clamor for a fixed time for completion, and suggests first November 1st and then November 15th as the limit. Cressler answers at once that as he was informed that they did not expect *to be ready* before November or December, he had made other contracts and was afraid that the holder could not *be shipped*

before November 1st. Then Brown seeks to inject into the contract a time-limit, or force appellee to abandon it. Appellee does not accede to this, and replies that the contracts are all made, but adds that it will do all in its power to have the holder shipped by the 15th of September.

The Appellee had a perfect right to take this course. It had made a contract with Appellant for a holder at a certain price and it had given Appellant the privilege of delaying the shipping of the bulk of the material (thereby saving to Appellant nine hundred dollars,—Record, p. 3,) until such time as the Appellant should think the price of iron was at its lowest point. It had begun on portions of the work and had made contracts with others, and had also entered into contracts for other jobs. And it was under no obligation to abandon all this and to insert into the contract with Appellant a further condition that it should be completed by a day certain, as demanded by Brown, because *he* had found that he had been penny-wise, and that the consumption was growing so large that he was afraid he wouldn't be able to supply the city with light. Contracts are mutual, there must be a meeting of minds. And after they are made, one of the parties cannot demand other provisions because he may have grown wiser or the situation may have changed.

Brown evidently thought, however, that no such petty rules were binding on him or his company, and so in his letter of August 7 he first uses the words "agreed time." (Record, p. 58.) And from that date on to the completion of the work he rings the changes on "agreed time," "contract time," etc., etc., until he has probably by constant repetition brought himself to believe that there was a time originally agreed upon, and that that time was the date that he afterwards concluded was as long as he could wait for a new holder, taking into consideration the rapid growth of Minneapolis and the increased consumption of gas. During this whole period many letters passed back and forth (Record, pp. 58–68), and the only allusions that Appellee makes to this incessant clamor about "contract time" are in its letters of Oct. 27 and Dec. 13. In letter of Oct. 27 (Record, p. 62) it says it can ship a section of the holder by Friday of the next week (Nov. 5), so that men can go up *and commence the erection* the following week (Nov. 8 to 15), and adds: "As it is, we will get the holder up before contract time, and just as fast, now, as a holder can possibly be rushed." It was hardly necessary, in the face of these dates, for Cressler to explain that it was his understanding that Appellee was to have all winter to complete the holder, and that when he spoke of "contract time" he meant that time. (Record, p. 25.) And in the letter of Dec. 13 (Record, p. 65), written by Appellee's bookkeeper in Mr. Cressler's absence (see Record, pp. 25, 26), the general understanding at Appellee's offices and shops that they were to have all winter to complete the contract appears.

Again, Appellant would have the Court believe that Cressler made a contract limiting the time to four months, without a single stipulation or provision as to when the tank and building (without which the holder could not be built) should be ready. This is unreasonable and improbable. Cressler testifies that the uncertainty about the time when the tank and building could be built was the main reason why no time was fixed; that Brown did not know how soon he would be able to build the tank; that he would not pay what they then asked for brick, as he had all winter to build the holder, etc. (Record, pp. 23, 24, 25.) Brown himself writes the month before Cressler went to Minneapolis: "I want to take my time about the tank and building, and

want to be entirely out of the way when the iron arrives." (Record, p. 54.) And it appears that at the time Cressler was there no contract had been made for the tank and building, and that none was made until July 3, or a day or two after that date. (Record, pp. 36, 37.) Still, Brown, in the loose and exaggerated style (not to characterize it more strongly) in which all his letters are written, writes on July 3, *before the contract with Fisher was made:* "We have the tank and building well under way." (Record, p. 57.)

To recapitulate on this point. We think a fair examination of the testimony discloses that when the contract was made on May 28, *the price* was the main consideration in Brown's mind, and that that was agreed upon to his satisfaction, and the contract awarded to Appellee. That the time for ordering the sheet iron being left at his discretion, he thought that included also a discretion to make changes or additions to the contract when he concluded to order the iron. That when that time arrived he began to appreciate, what is a matter of public knowledge, that the early summer of 1880 had brought a tremendous influx of population to Minneapolis, and, as a consequence, a rapidly increasing consumption of gas, and that it was necessary that the new holder should be ready for use as soon as possible. Hence his attempt, when notifying Appellee to order the iron, to fix a time limit, and his constant urging and threatening through the long correspondence that followed. This correspondence we regard as immaterial on this point. The Appellant cannot, by iteration and reiteration, change or add to the contract it originally made. Nor do we consider the alleged admissions of Cressler to Rand in February, 1882, (Record, p. 43,) as of any importance; for in the first place Cressler testifies that he never said anything of the kind, (Record, pp. 51, 52,) and it appears that Cressler's visit there at that time was to compromise and settle this very claim in suit. (Record, pp. 44, 45.)

It follows, therefore, if this Court agrees with us and the lower Court that no time limit was fixed in the contract, that Appellant's third assignment of error is not well taken and need not be considered.

II.

Appellee does not claim that there was an acceptance of the holder in the full legal sense of the word, but it does assert that there was such an acceptance of it as to entitle Appellee to recover the balance due, less the deductions made by the Court below for the difference in value between the holder required by the plans and specifications and the one actually constructed and for the other items deducted.

This is perfectly clear from Brown's letter of January 19, 1881, (Ex. 47, Record, p. 68,) although in that letter Brown again insists that there was a time fixed for completion.

III.

Appellant's third assignment of error is its claim for profits growing out of the supposed delay in the completion of the work.

Even if there had been a time fixed in the contract, we deny flatly that the assertion on page eleven of Appellant's brief that the cause of the delay was "the willful and deliberate neglect" of Appellee, is true. The testimony cited by Appellant fails to substantiate it, and other testimony clearly shows its falsity. (Record, p. 26, Ex. 28 p. 62, Ex. 39 p. 65.)

Let us turn now to the claim itself. As before stated, a decision in Appellee's favor on the first assignment of error does away with this claim, even if it rested on a substantial basis. But it has not substance enough to stand of itself.

The witnesses Brown and A. C. Rand have labored to show that in three months they might have made profits in addition to what they did make to the very pretty sum of nearly the whole contract price of this holder.

Brown, when examined in Florida, first tries his hand at making this claim of profits appear real. (Record, pp. 34, 35.) We leave the Court to extract knowledge from this statement, if it is possible.

But Brown was evidently not very well pleased himself with this maiden effort, and so he goes at it again after a winter's rest and recreation in the South, and evolves a further statement (Record, p. 48,) by which, we submit, he has cleared it only after the manner of the cuttlefish.

A. C. Rand, however, comes to the rescue with his learned dissertation on the subject. (Record, pp. 42, 43.) But we regret to say that the cause of science has not been promoted by either of these treatises.

It does appear, on cross-examination of Brown, that during all the time they claim these profits might have been made, they actually supplied gas out of the old holders to all who wanted it. Brown testifies, (Record, p. 36,) "From the 15th of November, 1880, to the present time we have never declined to supply gas to any person wishing it within reach of our pipes. During this time there has been no other gas manufactory in Minneapolis."

And no consumer out of the whole population of Minneapolis is called to testify that he did not get all the gas he wanted during this time.

But the most preposterous part of all this claim of loss is that Rand's estimate of these shadowy profits, is based on a pressure of "forty-five tenths" (or *four and a half* inches) (Record, p. 42,) while Brown's estimate stands on *four* inches pressure (Record, pp. 34, 48.)

Now, the specifications for this holder called for only four inches pressure. And yet these mathematicians starting from premises differing one-eighth and pursuing the same course of calculation both arrived at the same result of lost profits to a penny! Is anything further needed to show that all this is mere guess-work.

Besides this, Cressler testifies that if he can understand this claim (Cressler's testimony on this point was taken in Indiana before Rand had given his testimony and before Brown had been examined the second time) the pressure on which it is based is simple robbery to the

consumer, (Record, p. 28.) And in England an Act of Parliament was thought necessary to reduce such excessive pressure.

Journal of Gas Lighting for 1878, pp. 341, 421.
Record, p. 43.

But if it should be conceded, for the sake of argument, that the Appellant has made it clear that such profits might have been realized had the holder been completed at the time Appellant claims it was agreed it should be, would such profits be a proper element of damages in any event? We insist that both reason and authority answer this inquiry in the negative. We understand the settled rule in such cases to be as follows:

The damages which a party to a contract ought to recover in respect to a breach of it by the other, are such as arise naturally from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach.

Hadley vs. Baxendale, 9 Exch. 341, and see opinion, p. 355.

They must also be certain, both in their nature and in respect of the cause from which they proceed. They must not be the remote, but proximate, consequence of the breach of contract, and must not be speculative or contingent.

Beaupre vs. Pacific, &c., Tel. Co., 21 Minn. 155.
See also, *Booth vs. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487, (495.)*
Masterson vs. Mayor of Brooklyn, 7 Hill, 61, (73.)

Do these profits, in any particular, fall within this rule? On the contrary, are they not expressly excluded by it? We submit that even after paying the Appellant's witnesses the compliment that their many attempts to explain how these profits might have been realized have made the claim a trifle less obscure; still, it appears that they are speculative and uncertain in the extreme. The holder was not warranted for any length of time, and all machinery is liable to be out of repair. Such a contingency might materially reduce the profits of the Appellant in the course of three months. Then the realization of such profits assumes that during all of that period the whole system of mains, pipes, meters and burners of the Appellant, extending for miles throughout the city, should work perfectly, without waste or loss. A beatific condition of things hardly attainable in this ill-regulated world. And so a thousand contingencies might arise to affect the question of profits, reducing it in every case to a pure matter of speculation and guess-work.

Again, the rule requires that the damages should be such as may reasonably be supposed to have been contemplated by the parties as a probable result of a breach of the contract. It is not shown that Appellee knew at the time of making the contract that Appellant was making the enormous profit of *one hundred and thirty-three and one-third per cent* on each thousand feet of gas it sold, (See Record, pp. 36, 44,) and that it would have to respond to that liberal measure of damages

in the event of a breach. Indeed, the reluctance of Appellant's witnesses to testify to the *rate of profit*, when forced to do so by us, sufficiently shows that they did not care to inform the Appellee nor to have this record inform the citizens of Minneapolis, with whom the power lies of regulating the price of gas, of the extortionate monopoly they are enjoying. Is it not reasonable to suppose that the Appellee would have insisted on a liquidated sum as damages for a breach if it had been informed of the measure of punishment in store for an honest failure to complete the holder within the time claimed to have been fixed? And can it be said that the Appellee's agent, Mr. Cressler, who had never been in Minneapolis before, could have contemplated that the increase in gas consumption would reach seventy or eighty per cent in a year. (See Record, pp. 36, 44.)

We think it unnecessary to discuss this point further, for aside from the particular circumstances of the case, the authorities are conclusive that profits, less uncertain and remote than these, are not recoverable.

See Taylor v. Maguire, 12 Mo. 314.
Cassidy v. Lefevre, 45 N. Y. 562.
British Col. Saw Mill Co. v. Nettleship, 3 Law Rep. (Com Pleas) 499.
Abbott v. Gatch, 13 Maryland, 314 (332).
Pittsburgh Coal Co. v. Foster, 59 Pa. St. 365.
French v. Ramage, 2 Neb. 254.
Frazer v. Smith, 60 Ill. 145.
Halm v. Horstman, 12 Bush. (Ky.) 249 (256).

IV.

The Appellant's fourth assignment of error is that the Court below did not apply the proper measure of damages for the variations from the specifications which were found; that some different rule should have been applied than the deductions made of the difference in the value of the iron ($675), the omitted guard-rails and braces ($50), and the cost of adjusting the holder ($10).

We submit that under the evidence no other measure of damages could have been applied. The exact specifications for the holder not having been complied with, the Appellant could have reconstructed the holder exactly in accordance with the specifications, and could have then set off such cost of reconstruction against the contract price, but instead of doing that it elected to retain and use the holder subject to the difference in value between the holder contracted for and the one furnished, (Record, pp. 68, 69,) and the Court below has made a full allowance for that difference in value.

The specifications required that "the holder must be of annealed iron and straightened true and level and be perfectly free from buckles, all the material used to be the very best of their respective kinds, and the workmanship must be first-class in every respect." (Record, p. 75.) The Court below does not in terms find that the holder was not constructed of annealed iron, (Record, p. 12,) although that perhaps may be inferred from the language of the decision.

We insist that the evidence fully establishes that annealed iron was used, or, if not, that an iron of equal value and strength went into the

holder, and that the Court below in allowing the difference in value of the iron gave the Appellant all that it was justly entitled to.

We have at no time claimed that there was a literal compliance with the specifications, but we do assert with all confidence that they were faithfully followed in all essential particulars. The specifications covered thirteen pages, and provided for all the minute details. Mr. Cressler, Mr. Creighton and Mr. Remmert, all frankly admit that there were some slight deviations from the specifications, that the angle iron was curved cold instead of hot, that the vertical stiffeners were of channel iron instead of buckle plate or bead iron, and that the reason why that was used was that there was only one firm manufacturing the other and they were so pressed with orders that it was impossible to get it within a reasonable time, that the top curb was bent cold instead of hot, that the diagonal brackets were left out entirely, as it appeared they were not practicable and had a tendency to draw the crown of the holder and to make the strain unequal, that there was no guard-rail for the reason that they are only put on holders that stand out exposed to the weather and for the convenience of those who go upon them to clean off snow, etc., that the guard-rail and diagonal brackets would cost about fifty dollars, that only one man-hole, instead of two, was made in the holder. But these witnesses all agree that none of these slight changes or omissions in any way affected the strength, durability or working of the holder.

The testimony on the kind of iron used stands as follows:

Mr. Droege, the vice-president and practical man of the Licking Rolling Mill Company, which mill, it appears, has been doing business for thirty-two years or more, testifies that the order for this holder was for annealed iron, that this iron was subjected to the same general inspection by him that he gives to all iron that leaves their works, that he knew the quality of the material out of which this iron was manufactured, and that it was first-class, and that all the sheets shipped for this holder were of first-class quality of boiled annealed iron (Record, pp. 30, 31).

Mr. Cressler testifies that all of the sheet iron which went into this holder was ordered of the Licking Rolling Mill Company; that the sheets of annealed iron which were shipped by that company as testified to by the witness Droege, were the same sheets that were forwarded to Minneapolis and went into the construction of this holder; that this iron was not mingled with other iron at the shops, but was piled separately; that he knows that these sheets are the same ones used in the holder, because holders vary in size and construction, and the sheets are made specially for each holder, and the order is given for the number and size of sheets required, and that he knows this was done in this case (Record, pp. 51, 52).

Dickey, the foreman who put the holder together at Minneapolis and who handled all the iron, and who was pronounced by Rand, the Appellant's foreman, to be the best workman he had ever seen (Record, p. 29), states that the iron was annealed sheet iron, that he had been engaged in constructing gas-holders for nine years and had erected them in nearly every State, and that this holder was constructed of better material than the average of such holders. (Record, p. 30.)

Creighton and Remmert, who had charge of the construction of those parts of the holder which were made at Appellee's shops, which did not include the sheet iron, say frankly that they do not know whether

annealed iron was used or not (Record, p. 27), and it is not to be expected that they would.

The Appellant opens fire on the annealed iron question with the omniscent Brown, who, of course, testifies in his *ex cathedra* fashion, that there isn't a pound of annealed iron in the holder except the rivets, (Record, p. 33.) He does not inform us whether he is competent to judge of this; he does not tell us that he made any tests to determine it, he simply says that it is so, and immediately states what the reduction *in price* should be.

Next comes A. C. Rand, the president of the Appellant, who testifies: "I do not think there is any annealed iron in the holder—I judge so from the leaks in the holder," and that he examined some of the sheets that were left over after the holder was completed, and that by bending them they would break, which would not be the case if the iron had been annealed. (Record, p. 41.) But on cross-examination he testifies that a sheet of annealed iron may be broken if bent back and forth a sufficient number of times. (Record, p. 45.)

Then the witnesses Strothman and Pray are examined as experts.

A. C. Rand testifies (Record, p. 50), that the piece of iron examined by Pray is a piece of the sheet examined by Strothman, and that he had that sheet put into the cellar in April, 1881, and that it had remained there ever since, until he took it out in June, 1883, for Strothman's examination.

A. T. Rand testifies: "I sent a piece or sheet of iron to Mr. Strothman yesterday to have it examined by him. * * * Since the construction of the holder that sheet has been lying on the ground near the holder building." (Record, p. 47.) And on cross-examination, he says: "The sheet of iron which I sent to Mr. Strothman had been lying unprotected from the weather since the completion of the holder." (Record, p. 47.) We leave the Court to reconcile these statements, and take up the testimony of the experts themselves.

Strothman testifies, that in his opinion the sheet he examined was not annealed iron, that he took a piece off and put it in a vise and took a wrench and turned it back and forth twice, and it broke in two, that he don't know that it is the same iron as that in the holder, that he made no examination of it with the iron in the holder although he was examining the holder for forty-five minutes on the same day, that he never made any annealed iron and don't know how iron is annealed, and that annealed iron can be broken by bending it back and forth, but that in his judgment it would require more bending than he gave this. (Record, pp. 45, 46.)

The other expert, Pray, testifies that he examined a piece of iron said to be of the same quality of iron as the holder, and that he should say that that piece was not annealed iron, that his test was by bending and breaking it while cold and also after heating it, that he annealed the piece he tested, and that his process was by heating it in a common forge and burying it in lime. He further states that he don't know of his own knowledge that it was the same iron that was in the holder, (Record, pp. 49, 50,) and yet he states that he examined the holder itself on the same day and could certainly have made a comparison of the iron, if that had been thought wise. He admits that his process of annealing differs from the ordinary way, and it does not appear what effect the thrusting of hot iron into lime may have upon the fibre of the iron.

And then, to help out a lame case, Appellant tries to prove that Dickey admitted that there was no annealed iron used, which is denied by Dickey *in toto*, (Record, p. 52.) and Appellant's witnesses further detail what they think Cressler said when in Minneapolis in February, 1882, for the express and known purpose of compromising and settling the very matters in suit. (Record, pp. 44, 47.) Aside from the plain inadmissibility of this testimony, Mr. Cressler denies expressly that he made any such admissions. (Record, pp. 51, 52.)

Now, Cressler, on rebuttal, says that he has read the testimony of Strothman and Pray, and that the tests they applied furnish no basis for determining whether the iron they used was annealed or not, and gives his reasons for the statement. (Record, p. 52.) So that conceding that they tested a piece of the same iron as went into the holder (about which, we submit, there is grave doubt), it does not determine the question. If the court is to believe Mr. A. T. Rand, the piece of iron that Strothman tested had been lying exposed to the weather for *two years and a half*. Can the court say that the wet and cold and heat from December, 1880, to June, 1883, would have no effect upon the fibre of the iron in the shape of rust and disintegration? And Strothman admits, as Cressler states, that annealed iron could be broken by the same test, only that he thinks it would require more force than he used.

But why should this doubt exist as to whether the iron examined was the same as the iron in the holder? The holder stands there in Minneapolis, a huge structure forty feet high and more than two hundred feet in circumference, and is kept under lock and key by Appellant. It had been there more than two years when the testimony was taken, and this suit had been pending since July 15, 1882. What was there to prevent Appellant from having experts examine the holder itself? That would have settled the question forever. And why did not the witnesses Strothman and Pray, when they did examine the holder, on the same day that they tested the iron, make such a comparison of the iron as would enable them to speak authoritatively on the subject?

Aside from these witnesses, the only persons testifying to the quality of the iron are Brown and A. C. Rand, the former of whom does not pretend to have tested the iron; and they are practically the parties to the suit, as between them they own all of the very desirable stock of the Appellant Company.

On the other hand, two of the Appellee's witnesses are purely disinterested persons, and they are the persons who would naturally *know*, beyond any doubt, whether this was annealed iron or not. Droege, the man who knew the iron when it was being manufactured, lives in Covington, and has no interest whatever in the Appellee or this suit; and Dickey, the man who put the holder together and had to bend and cut and rivet the sheets, lives at Lexington, Missouri, and had not been employed by Appellee for some time, and had no interest whatever in this suit except the interest that every honest mechanic has that his work shall be respected.

And, throwing the testimony aside, is it probable that the Licking Rolling Mill Co., one of the oldest and largest iron concerns in the country, with a business reputation and standing of more than thirty-two years, would send out of their works the cheap, brittle, faulty, kind of iron that the Appellant would have the Court believe was used here,

in spite of the fact that the order was for annealed iron and that they knew it was for a gas-holder in one of the largest cities in the growing Northwest? Or is it likely that the Appellee, a new Company, just formed, in one of its first contracts, for the purpose of saving $675 on a $9,000 job, would attempt such a palpable fraud as this?

But even conceding that a different kind of iron was used, where is the evidence upon which the Court below could have applied a different measure of damages from that which was applied.

Cressler says, (Record, p. 24), "The real value of the holder, as constructed and completed, was the sum of $9070," i. e. the contract price; he and the witnesses Creighton, Remmert, Coverdale and Dickey, all testifying that though the holder varied from the specifications in some particulars the variations did not affect its strength, durability or working. (Record, pp. 24, 26, 27, 29, 30.)

Brown testifies, (Record, p. 33): "Annealed iron * * * commands from one-half to three-fourths of a cent per pound more than common iron in the markets of the world." He further testifies, (Record, pp. 33, 34): "The holder as constructed * * * was of very much less value than it would have been had it been constructed of the material and in the manner specified in the contract. I would not give anything for another like it. I do not think it is worth $4000." But he fails to give his basis of calculation, except to declare at the outset that it was full of buckles and uneven places and leaks and scarcely fit to be used, and then to assert later on, when trying to establish the claim of lost profits, that "This holder, if in action, would have given us, *and did give us, when in action*," the pressure required, and that no other holder has been used or constructed since. (Record, pp. 34, 36.)

A. C. Rand, testifies, (Record, p. 41): "Annealed iron is worth about one-half a cent per pound more than common iron." And adds that he does not think the holder is of more than half the value of the one contracted for. But he too, in the effort to show lost profits, states that this holder after having been in use over two years is giving them not only the pressure contracted for, but five-tenths more! (Record, p. 42).

This is all the testimony on the subject of the difference in value, and we submit that the Court below taking all of it and weighing it could not, if he concluded there was a difference in the iron furnished, adopt any other measure of damages than to allow three-fourths of a cent per pound on the 90,000 pounds of iron in the holder ($675), the value of the omitted portions ($50), and the cost of properly adjusting the holder ($10).

There is an old and homely saying that "the proof of the pudding lies in the eating," and we can think of nothing more pat to the case at bar.

We have the main controlling fact staring us in the face here, and drawn reluctantly out of the Appellant's own witnesses, that this holder is the only holder that the Appellant has had in use for nearly two years and a half, that prior to that it had two smaller ones in use, but immediately on the completion of this holder, one of the old ones was demolished and the other has since lain idle, that the increase of gas consumption since that time has nearly doubled, and that this holder has supplied all of the gas consumed. (Record, pp. 36, 39, 40, 44, 47.)

Is not this conclusive that the slight variations, which Cressler admits

were made, did not in any substantial way affect the value of the holder. If a holder does the work for which it is constructed and has done so for a period of two and a half years, during which the population of the city has at least doubled, what better test of its efficiency can be applied?

This, standing alone, would be sufficient to refute the Appellant's testimony that it was when first used, and has always been full of leaks and imperfections and worthless. But there is another significant fact, which was also drawn out of Appellant's witnesses, strongly confirming the efficiency of the holder, and that is that though this is the only holder Appellant has in use, and worthless as Rand and Brown say, it has not attempted to build another one, (Record, pp. 36, 45,) and this in spite of the fact that the consumption is increasing enormously, and that a new one could be paid for *out of the profits* in less than two months.

In addition to these convincing facts, there is ample testimony that this holder is first-class in every respect.

Dickey, who constructed the holder, has been engaged in and had exclusive charge of the construction of holders for nine years, and has erected them in nearly every State, and a number in some States, and testifies that the workmanship was good, and that the holder worked smoothly and nicely when completed. (Record, p. 30.)

Remmert who has been foreman of the pattern and boiler shops of Appellee for the past nine years, went up to Minneapolis in January, 1882, to examine this holder which Brown was proclaiming worthless. He states that he was there about all day, and was in the holder building about an hour, that the holder was two-thirds up and that he found it in good working order, that it tipped for the reason that one of the counter-weights was off, that it was two-thirds full of gas, that he could not detect any leakage, or smell any gas. He further states that he was introduced to a Mr. Rand, and that he also talked with two men who *called themselves* foremen of the retort house and purifying house respectively, and that they said that the holder was all right and a good job, with the exception of a few small leaks on top at the crown. That about two weeks after he examined similar holders at St. Louis, Louisville, Council Bluffs, Omaha and Des Moines, and that he considered this holder equal to those in its construction and working. (Record, p. 27.)

The Appellant made a great point of proving that it never had a foreman of either the retort or purifying house, in order to discredit Remmert's testimony. In the first place, Remmert only says that they called themselves so, and the Court is well aware that in every group of men of high or low degree there will always be some one who takes the lead and acts as spokesman and constitutes himself the leader whether he is paid more or not. In fact, Remmert took just the shrewd and judicious course in his examination that would lead him to find out the exact truth. Instead of going to the officers and owners of the Appellant, at their office, who had already shown their bias, in letters to the Appellee, or to another one of the numerous Rand family, who was the superintendent at the works, he goes to the men who are in and about the holder, day in and day out, and who *know* just how the holder is acting and working, and ascertains what they think of it. And we need no better evidence.

R. T. Coverdale, of Cincinnati, a gas engineer and contractor of thirty years standing, testifies that he went to Minneapolis in December, 1882,

at Appellee's request, to inspect this holder, and that the holder was in tip-top shape and seemed to be as good a holder as he had ever seen, that he had seen a great many and had had as many as forty constructed for himself, that the iron was in good shape, that it was well rivited up and as free from buckles as any holder he ever saw, that the holder was then in use and was more than two-thirds full; that the holder-house was closed at the time, and that he could detect no smell of leakage of gas, and that if the holder had been leaking to any considerable amount he could have detected it. (See Record, pp. 29, 30.) And he testifies to a conversation with W. W. Rand about the holder.

From the Appellant's testimony it would appear that this holder worked about as clumsily as a Dutch wind-mill, and was no nearer gas-tight than a sieve would be. We think they have overdone the matter. They "protest too much."

Brown, in his broad manner, writes, April 21, 1881, that it is a complete failure, that it tips and is a mass of daub and putty to stop leaks, that the leaks are literally by thousands, etc., etc., and that he intends to rebuild it that summer, if he can, (Record, p. 69,) and he testifies that it is full of buckles and uneven places, and was in April, 1881, scarcely fit to be used, etc., but he comes down a little in the number of leaks. (Record, p. 33.)

And yet no other holder has been used for over two years, no new holder has been built or contracted for, nor has any attempt been made to rebuild this one, though the Appellant's business has nearly doubled and the delightful profits of *one hundred and thirty-three and one-third per cent* have been steadily rolling up. (Record, pp. 39, 40, 44, 45.)

W. W. Rand follows his leader well in the matter of exaggeration, and states there were *a thousand* leaks, that it has not worked smoothly and is not plumb, etc. (Record, p. 38.)

A. C. Rand also says that in April, 1881, hundreds of places were stopped with putty and red lead and yet it was in a leaking condition, that many of the sheets were buckled, that it did not ride smoothly, that it was not level, that it worked hard and was binding and creaking, and still does, etc., etc. (Record, p. 41.)

A. T. Rand follows, a good fourth, and states that when gas was first turned into the holder it leaked all over the sides and on the top and around the pulleys, and has ever since continued to leak; that it was out of plumb, etc. (Record, pp. 46, 47.)

The Rand family having all declared what a worse than useless thing this "mass of daub and putty" is, two outsiders are taken down to the holder by A. C. and A. T. Rand while the testimony was being taken in Minneapolis early in June, 1883, after the holder had been in constant use more than two years, for the purpose of examining the same and testifying to its condition.

Without insisting on our objection interposed at the time that testimony as to the then condition of the holder is inadmissible, as it is not pretended that Appellee warranted it for any time, what does this testimony amount to?

Strothman testifies that he was in the holder building about forty-five minutes, that the windows were all open, that the holder was five and three-eighths inches out of plumb as near as he could measure it with his pocket rule and that he discovered *two leaks*. (Record, pp. 45, 46).